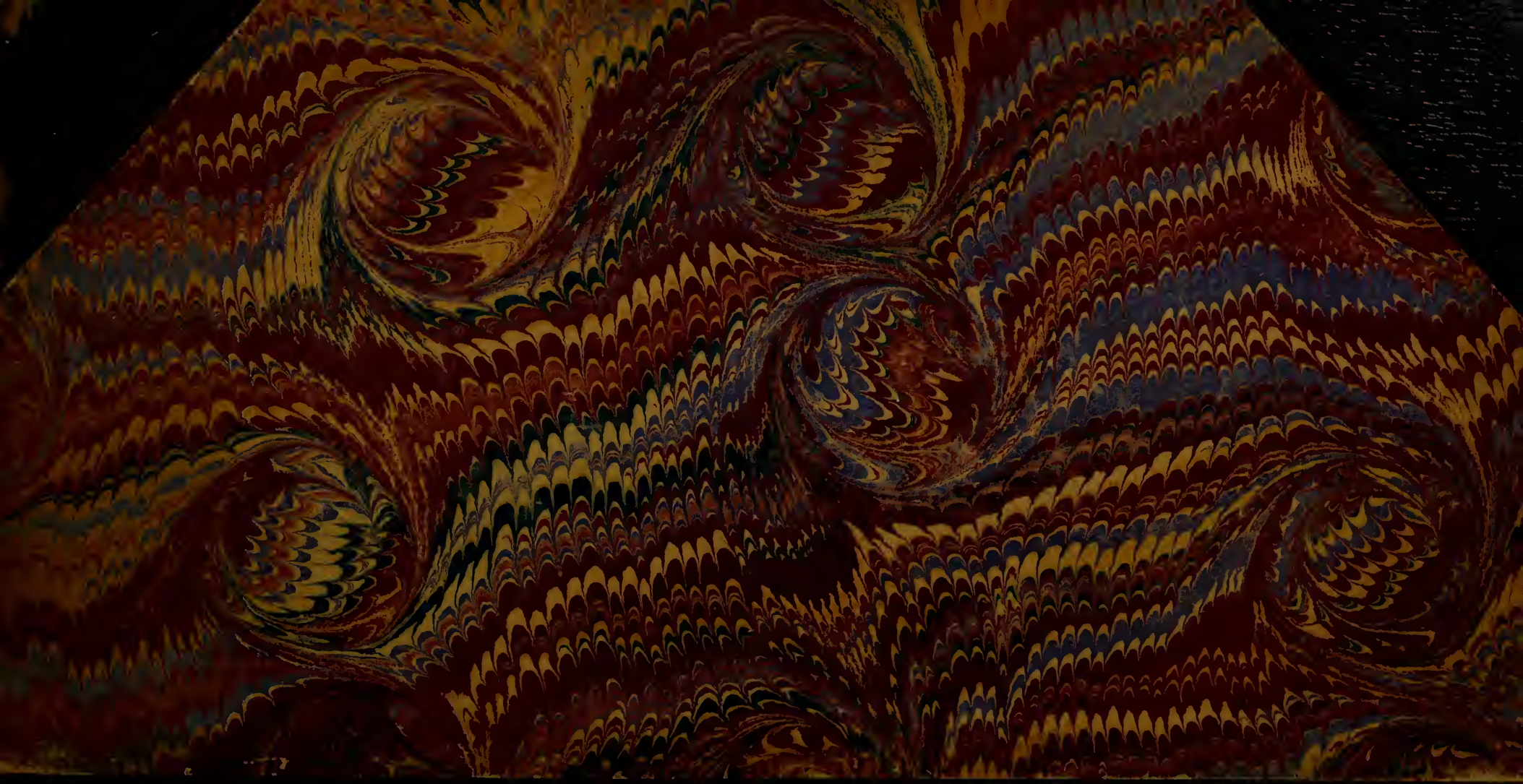

INTERNATIONAL LAW.

A MANUAL

BASED UPON LECTURES DELIVERED

AT THE

NAVAL WAR COLLEGE

BY

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(SECOND EDITION.)

PREPARED AND ARRANGED FOR PUBLICATION BY THE DIRECTION OF THE NAVY DEPARTMENT

BY

COMMANDER C. H. STOCKTON, U. S. N.

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PREFACE.

By the wish and direction of the Secretary of the Navy, a course of lectures on international law was arranged for by Capt. H. C. Taylor, U. S. N., president of the Naval War College, and delivered at that institution by the late Dr. Freeman Snow, of Harvard University, during the summer course of 1894.

The sad and unexpected death of Dr. Snow before the termination of the course at the War College prevented the preparation of the lectures for publication by his hands as originally intended by the Navy Department.

The manuscript and notes left by Dr. Snow, though incomplete, were considered to be sufficiently valuable to justify publication after due preparation. This has been done by the writer with the assistance of the friends of Dr. Snow at Harvard University. After consultation with them it was also considered wiser, in view of its proposed use, to arrange the volume according to subjects rather than to follow the original divisions by lectures.

To Professor MacVane, of Harvard College, especial acknowledgment is due for his valuable assistance in suggestion and material, the subjects with which he is charged at that institution covering matters common to both constitutional and international law. To Mr. Ernest L. Conant, the successor of Dr. Snow at Harvard, thanks are also due for valuable suggestions and services.

It is believed that anything that adds to the increased dissemination of the rules and usages of international law will strengthen its authority and extend its practice, and thus lead when the occasion arises to the creation of safe precedents by officers of the Navy. Under our Government at present the naval service is the only one combining permanence of tenure with constant dealings in matters of international law in peace and war.

In presenting this volume to my brother officers, I ask that due allowance be made for the difficulties arising from the circumstances of the publication, and I also desire to express to them my deep regret at the loss sustained by the death of Dr. Snow. Had he been spared to himself prepare this work for publication he would have more fully added to those services in his country's behalf which had in the past brought him wounds and distinction.

CHARLES H. STOCKTON,
Commander, United States Navy.

NOTE TO SECOND EDITION.

The first edition of this work being exhausted, the preparation and publication of a second and revised edition was directed and authorized by the Navy Department.

This has been done with a consequent slight increase in size. As one of the advantages found in the use of this manual was its convenient size, a considerable enlargement was not contemplated.

C. H. STOCKTON,

Commander, United States Navy.

NAVAL WAR COLLEGE,

Newport, R. I., October 21, 1898.

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AUTHORITIES CONSULTED.

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SYLLABUS AND REFERENCES.

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References: Dana's Wheaton, p. 352 and note; Snow's Cases, pp. 270–283; Halleck, I, p. 542; II, pp. 86–87, 122, 328–333; Hall, pp. 399, 524–528; T. J. Lawrence, pp. 306–314; Walker, p. 276; Phillimore, III, pp. 792–811; Bluntschli, art. 538; Heffter, sec. 122.

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References: Dana's Wheaton, secs. 335–346 and notes 169, 171; Halleck II, Chap. XXI. Winthrop, pp. 1213–1218, and 1258–1265; Snow's Cases, pp. 375, 377, 381–385; Glass, 405; Hall, pp. 434–459; T. J. Lawrence, Part III, Chap. IV; Calvo, secs. 2201–2214 and sec. 2294; Heffter, sec. 133; Bluntschli, art. 665; Creasy, pp. 536–556; Abdy's Kent, pp. 218–221; Wharton's Digest, secs. 338–341; Fiore III, pp. 212–235; Colonel Davis, pp. 226–232.

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References: Winthrop, Vol. II., pp. 1245–1274 and 1295–1321; Halleck, II, Chap. XXXIII; Wharton's Digest, secs. 354, 355; Woolsey, sec. 153; Colonel Davis, p. 246; Snow's Cases, pp. 364–384; Hall, Part III, Chap. IV; T. J. Lawrence, pp. 358–379; Walker, pp. 344–346; Calvo, secs. 2166–2198; Creasey, pp. 502–516, Phillimore, III, pp. 832–840; Maine, Lecture X.

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References: Dana's Wheaton, note 169; Wharton's Digest, secs. 3–6; Snow's Cases, pp. 372–385; Halleck I, pp. 433–436; II, Chap. XXXIV and pp. 500–511; Woolsey, secs. 55, 151; Kent, pp. 255–267; T. J. Lawrence, pp. 156–159; Hall, Part III, Chap. V and pp. 587–596; Heffter, secs. 133, 187–191; Walker, pp. 159, 371; Westlake, p. 130; Phillimore III, pp. 616–618; Bluntschli, acts 545, 727–741; Calvo, secs. 2453–2490, 3150, 3169 et seq.

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References: Dana's Wheaton, secs. 412–424; Wharton's Digest, sec. 405; Woolsey, secs. 163–167; Kent, 298–303, 478, 479; Halleck II, pp. 141–143, 177, 276–278; Hall, Part IV, Chaps. I and II and pp.617–618; T. J. Lawrence, Part IV, Chap. I; Owen, pp. 345–348; Walker, pp. 374–389; Fiore, Vol. III, pp. 370–432; Twiss, pp. 425–431 (Rights and duties in time of war); Testa, pp. 167–173; Perels, pp. 13, 237–240.

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References: Snow's Cases, pp. 393–402; Halleck, II. pp. 145–148; Wharton's Digest, secs. 394–400; Hall, pp. 622–650; T. J. Lawrence, pp. 500–509, 524–532, 550–554; Walker, pp. 448–458; Phillimore, III, pp. 225–236; Heffter, secs. 146–147; Calvo, sec. 2615 et seq.; Bluntschli, art. 749 et seq.; Twiss in war, pp. 441–454; Owen, pp. 311–316; Perels, pp. 241–254.

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References: Snow's Cases, p. 459; Halleck, p. 165; Walker, pp. 392–394; Hall, pp. 619–623; T. J. Lawrence. pp. 520–524—Phillimore, III, p. 247; Bluntschli, art. 768; Ferguson, II, pp. 402–410.

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References: Snow's Cases, pp. 438–459; Dana's Wheaton, note 15, p. 34; Wharton's Digest, secs. 351, 403–404; Halleck, II, pp. 160–169, 450; Phillimore, III, pp. 247–250; T. J. Lawrence, pp. 554–557; Walker, pp. 438–443, 496.

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References: Dana's Wheaton, pp. 630–639 and note 228; Woolsey, sec. 199; Wharton's Digest, secs. 373*a* and 374; T. J. Lawrence, Part IV, Chap. VII; Halleck, II, pp. 289–301; Hall, Part IV, Chap. VI; Harris; The *Trent* Affair; Yale Law Journal, March, 1896.

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References: Snow's Cases, p. 518 et seq.; Lawrence's Wheaton, pp. 960–976; Phillimore III, pp. 658–679; Revised Statutes United States; McDonnel, Rights and duties of belligerents, Proc. R. U. S., Inst. No. 245; Instructions of Navy Department. See Appendix.

INTERNATIONAL LAW.

INTRODUCTION.

Section 1.—Definition and Scope of International Law.

International law, as commonly understood, is that body of rules which governs generally the actions of modern civilized States in their intercourse with one another.

These rules are the outgrowth of the customs arising from the intercourse of nations, of various international agreements, and of the acts of States which have in the lapse of time been accepted as of binding force by the various civilized States of the world. They may be considered as being based upon the moral and intelligent convictions of enlightened mankind.

International law differs from the municipal or national law of individual States in that it does not proceed from any authorized law-making power and that it has no superior international tribunal whose functions it is to enforce the law in the case of its infraction. Nevertheless it is obeyed for the most part without question, and it is only upon exceptional occasions that resort is now had to war as a settlement of international disputes. Indeed, many States have adopted international law as a part of their municipal law, and a great majority of the cases that arise under it are adjudicated upon by the courts of law of the individual States. The Constitution of the United States specifically vests in Congress the power to define and punish offenses against the law of nations.*

Section 2.—Origin of International Law.

As a science this law is of comparatively recent origin. There was no international law in a modern or comprehensive sense either in the ancient world or during the chaotic conditions of the middle ages. As a system it does not date back beyond three hundred years and its development from its systematic origin is linked with the history of modern civilization.

It is true, however, that certain usages and obligations existed in earlier centuries that have become incorporated to a greater or less degree in this modern system. The law of maritime capture, for instance, dates back to the earliest days, and such international obligations as the immunity of ambassadors and heralds, the neutrality of States, and the right of asylum existed in the days of the Greeks and Romans, but, like the sphere of the amphictyonic council, were restricted in scope, and a violation of such obligations did not bring upon the offenders, as now, the weighty disapproval of other countries.

*Sec. 8, Art. I, Const. U. S.

With Rome, as an empire, began the idea that the external relations of States must be regulated by a common superior. During the supremacy of the Roman Empire its Emperor was such a superior. Rome being then a universal empire, her laws were practically universal in extent. The idea and the practice were coincident. After the fall of the Roman Empire for a time the theory of a common superior and regulator of nations continued. The rise, however, of many new States upon the ruins of the Roman Empire naturally led to a period of confusion which was followed by the growth of feudalism. This latter, though an improvement upon the preceding anarchy, was not favorable to the extension of good feeling among nations. It was not, as Hosack says, until the feudal system was declining that the modern law of nations, as observed in Europe, may be said to have fairly taken root.

Christianity began to exercise an important influence, however, and its doctrines tended toward greater humanity and a higher value of human life. The increased strength of the church gave a preeminence to the Pope of Rome. The Popes claimed authority over temporal princes, and, as a consequence of that authority, the right of adjudication in matters of international dispute. These claims were not idle ones, as history shows, and even now the Pope of Rome is still a mediator, though to a limited extent, and at the request mainly of the Latin nations.

The change which took place during the period covered by the fourteenth and fifteenth centuries marked the beginning of the modern era; this was a period of intense activity in every direction. It was distinguished by the revival of learning, the invention of printing, the introduction of the mariner's compass, the use of gunpowder, and by the changes resulting therefrom in warfare.

Upon the ocean great changes took place; the discovery of America and of the passage around the Cape of Good Hope opened a new field of maritime enterprise, which had quick development and important results. Ships were increased in size and differentiated in types, the war marine became distinct from the merchant marine; and the sea, which before had been a limit, now became a highway to all nations.

The increase of commercial intercourse, the multiplication of treaties, the more frequent employment of ambassadors, and the establishment of legations gave favorable conditions for the establishment and growth of the law of nations. The ferocity of the almost constant wars led to a revulsion of feeling in favor of more humane methods in the dealings of nation with nation, until, finally, the conclusion of the long and devastating thirty years' war by the peace of Westphalia and the appearance of the almost contemporaneous writings of Grotius marked what may be called the starting point of the modern science of international law and of diplomacy. Since that time international law has developed rapidly, and as the intercourse of States has become more and more close by the introduction of steam, the adaptation of electricity, and the extension of commerce, it has become one of the important branches of public jurisprudence.

Civilization and freedom tend to extend and make closer the relations between man and man and nations and nations. Thomas J. Lawrence, in his recent work, well says:

> Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature, identity of interests or even of passions and prejudices, all these and

countless other causes tend to knit States together in a social bond somewhat analogous to the bond between the individual man and his fellows. But, just as men could not live together in a society without laws and customs to regulate their actions, so States could not have mutual intercourse without rules to regulate their conduct.

Section 3.—Sources of Modern International Law.

By the sources of modern international law is meant the places where its rulings and principles are obtained.

The following may be given as the sources of modern international law:

1. The works of great publicists—the text writers of authority. These give both principles and usages.
2. The decisions and conclusions of prize courts, of official international conferences and of arbitral tribunals.
3. Treaties.
4. State papers of jurists, opinions of attorneys-general, confidentially and otherwise given to their respective governments.
5. Instructions, regulations, and ordinances issued by the States for the guidance of their own citizens or subjects, officers, and tribunals.
6. History of wars, negotiations, and current events.
7. The proposed codes and formulated views of voluntary international associations of jurists.

Though an attempt is made by the order of classification to give the relative value of these sources, still in practice, with the different writers and different schools in existence, it is almost impossible to make a rigid distinction.

International usage, however, may be considered as the touchstone which gives life and strength to the principles of international law. When rules, apparently sound, conflict, then usage, prevailing usage, should determine the rule to follow.

PART I.

INTERNATIONAL LAW IN TIME OF PEACE.

Chapter I.

Sovereign States; Territorial Property of States.

Section 4.—Sovereign States.

Sovereign States are primarily the great units or subjects dealt with and governed by international law. To a less degree international law deals with part-sovereign States, belligerent communities, corporations, and individuals. Cicero defines a State as—

> A body politic or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.

This definition is not complete without some additions and restrictions. A State must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign State it must not be subject to any external control. Thus a company of men united for commercial purposes can not be a State in the sense held in international law; neither can a tribe of wandering people, nor can a community be so considered, whose government is permanently incapable of enforcing its own laws or its legal obligations toward other States.

A sovereign State, then, may be defined as a body politic, supreme over its members, subject to no external authority, which has attained a certain size, sufficiency of importance, and degree of civilization. Fixed in its own territory, with well-defined boundaries, it must have provided for the continuity of its existence.

So long as a State possesses the requisite attributes mentioned in the preceding paragraphs international law does not concern itself with the form of its government; it may be an absolute monarchy, a limited monarchy, or a republic; it may be a centralized State or a federal union; or it may change from one to another of these forms at will, without in the least affecting its position in the view of international law.

Section 5.—Internal and External Sovereignty of States.

The principle that primarily the units subject to international law are sovereign States means that, in order to be fully subject to international law a State must have complete independence in the management of its foreign relations, must have what has been called "external sovereignty." A State may be sovereign in its domestic affairs and yet not be sovereign in the international sense. It may be under the "protection" of some other State, as is the case of the republics of San Marino and Andorra in Europe, the Transvaal Republic in South

Africa, and with most of the semibarbarous States throughout the world. Again, a State loses its external sovereignty by being permanently linked with another State under a common sovereign, as for example, the Kingdom of Norway. Of course a State that is federally united with any other State or States ceases to be a sovereign State in the sense of international law, no matter how complete its freedom of action may be in its domestic concerns.

It is necessary to the possession of external sovereignty that the State claiming it shall be recognized by other States as free and independent. Until such recognition on the part of other States is universal, a new State claiming external sovereignty can exercise it only toward those States that have recognized its independence.

It is not necessary that the holder of the external sovereignty of a State should also hold the ultimate or political sovereignty. In a popular government such as our own, the ultimate sovereignty resides in the general body of citizens who have the right of voting. But it would be difficult, if not impossible, for the voters to reserve to themselves the actual exercise of the external sovereignty of the United States. In foreign as well as in home affairs the daily exercise of the national sovereignty is intrusted to the National Government established by the Constitution. The President has the immediate direction of our relations with foreign States. In making treaties his action has to be ratified by two-thirds of the Senate. Declaration of war can be made only by the direction of Congress. Further, in all matters capable of regulation by law the exercise of our external sovereignty may be directed and controlled by acts of Congress. But of course these authorized organs of the national sovereignty are subject, in all they do, to the restrictions of the Constitution. So long, however, as they keep within the lines of the Constitution, they wield, at least in the legal sense, the sovereignty of the United States.

Internal sovereignty is a matter of fact and does not depend upon the recognition of that fact by any other State, while external sovereignty depends upon the consent and recognition of other States, either tacitly or directly given. A country lacking internal sovereignty is wanting naturally in one of the elements of a sovereign State; but a country may have perfect internal sovereignty and yet not be a sovereign State.

It is perhaps well to mention here the distinctions between a State and a nation. Though the terms are frequently used interchangeably, strictly speaking a nation is composed of people of the same race, whereas a State may be composed of several nations. The Jews are considered to be a nation, while Austria-Hungary as a State is composed of three distinct races: Germanic, Slavic, and Magyar. This distinction has in recent years become of importance from the fact of the movements toward the unity of races, each under one State. Thus we have the Pan-Slavic movement, the Irridentist party in Italy, and various other cases.

Governments of States are to be regarded only as agents through which the States express their intentions. Though clothed with authority to speak for the State for the time being, these governments may be superseded at pleasure, without the State losing its identity in the family of nations or being affected in its rights or obligations to other States. Chancellor Kent says upon this point.

It is well to be understood, even at periods when alterations in the constitutions of governments and revolutions in States are taking place, that it is a clear position of the law of nations that treaties are not affected nor positive obligations of

any kind, with other powers, or with creditors weakened by any such mutations. A State neither loses any of its rights nor is discharged from any of its duties by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication.

Hall says:

If in altering its constitution a State were to abrogate its treaties with other countries, those countries, in self-defense, would place a veto upon change and would meddle habitually in its internal politics. Conversely, a State would hesitate to bind itself by contracts intended to operate over periods of some length which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the State, either from social anarchy or local disruption, is momentarily unable to fulfill its international duties, personal (State) identity remains unaffected; it is only lost when the permanent dissolution of the State is proved by the erection of fresh States, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable.

Section 6.—Classification and Equality of States.

(*a*) *Classification of States.*—States are generally classed under the following heads: Centralized States, Personal union, Real union, Confederate union, and Protected or Part Sovereign States.

A Centralized State is a single State under one sovereign or central national government. France, Spain, and Portugal are examples.

A Personal union consists of two or more distinct States, otherwise independent, temporarily united under one sovereign. Hanover and Great Britain have been historical examples of this class.

A Real union consists of several originally separate States perpetually united under one sovereign or political organization, though each State may preserve its distinct internal laws. Austria-Hungary is an example of this class of one type, and Great Britain and Ireland of another. A federal union like that of the United States is practically an example of a real union.

A Confederate union is one in which the States forming the union have each retained their independent and individual personality, but have formed into a confederation for purposes of domestic policy and mutual assistance. Of course the external policy of each State is affected by the existence and aims of the confederation. The Germanic and Swiss confederations are examples of this kind.

Protected States are those placed voluntarily or otherwise under the protection of another and stronger State on specified conditions. The effect of the protectorate upon the sovereignty of the State depends upon the conditions of the protectorate. If the protected State retains its capacity to treat, to make peace or war, and to exercise the essential rights of a sovereign State, it does not lose its position as a sovereign State. These rights must be de facto as well as de jure.

States which are dependent, however, upon other States with respect to the exercise of certain rights essential to perfect external sovereignty are classed as Part-Sovereign States. They have been termed Semi-Sovereign States, but as that term means an equal division of sovereignty the term Part-Sovereign States is considered to be better and more comprehensive in its description.

Three differing conditions may exist with regard to Part-Sovereign States.

The first is when a definite political community is obliged to submit itself habitually, in matters of importance, to the control of another State. When in this condition the community which is Part-Sovereign

is said to be under the suzerainty of the other State. Bulgaria, Egypt, and the little Republic of Andorra are examples of Part-Sovereign States existing under these conditions at the present day. Korea was formerly in the same relation toward China, and Thibet may now be deemed a suzerain State of China.

The second condition is when a country or State is one of a loose form of confederation, whose members, while giving the major portion of the external relations to the central authority, retain certain portions for themselves. The members of the old German and Swiss confederations were examples of this class of Part-Sovereign States. The present German Empire and Swiss Confederation have become closer unions.

The third condition in which Part-Sovereign States exist is that of permanently neutralized States, like Belgium, Switzerland, and Luxemburg. They are generally considered as fully independent States; but as their very existence and independence are guaranteed upon certain conditions by the great powers of Europe, it is difficult to class them as fully sovereign States. These conditions are that they must refrain from all belligerent operations save such as are necessary to protect them from actual or threatened attack. These States may be considered to be under the protection as well as control of the great powers of Europe.

(*b*) *Equality of States.*—All sovereign States are equal in the eye of international law.

This equality is of course only a legal one and does not in practice always shield the weaker State from violence and wrong at the hands of more powerful neighbors. But it is the very object of international law to restrain these unjust and oppressive acts; and it is to its credit that they occur less frequently now than formerly.

There are States not yet referred to which have been practically admitted into the society of international law, but which can hardly lay claim to all of the rights of sovereign States. These are the semi-civilized States of the East. Such are Turkey, Persia, China, Korea, Morocco, and other smaller States. The civilized States of Europe and America have entered into treaty relations with these States and have established generally diplomatic relations with them, yet they are not permitted to exercise jurisdiction over the subjects and citizens of European and American States residing or traveling within their limits. Foreign consuls exercise a jurisdiction in their territories which thus derogates from their sovereignty. This arrangement is, however, regulated wholly by treaty. Japan is now considered to be capable of fulfilling her obligations to other States, and this restriction is in her case being removed by treaty by the civilized powers.

The condition of chronic civil commotion existing in many of the Spanish American States has raised the question whether they should be treated in all respects as sovereign independent States. Indeed, in several respects rules of international law peculiar to them and their conditions have been adopted which will be given hereafter.

In palliation of their condition it might be said that when they began their existence as independent States seventy years ago their people had not the slightest experience in self-government. They were ruled by governors appointed by the King of Spain, and they existed largely, if not solely, for the benefit of the mother country. Their commerce was restricted to Spain and the carrying trade to Spanish ships. The different provinces were not permitted even to trade with each other, and the products of the soil were confined to those articles

that would not compete with those of Spain, while education was limited and all local affairs directed by the central authority. Upon gaining their freedom they largely took the Constitution of the United States as a model and, though entirely unfamiliar with its practice and its spirit, they attempted to govern by its methods. Notwithstanding the general want of success in their first attempts at self-government, it must be admitted that such States as Mexico, Chile, and Argentina have made decided and substantial progress.

Section 7.—Fundamental Rights and Duties of States.

There are certain rights and duties of a primary nature which pertain inherently to a State which may be called fundamental rights and duties.

The great fundamental rights of a State are—

1. The right of independence and legal equality among other States.
2. The right of self-government, with absolute and exclusive jurisdiction over its own territory.
3. The right of self-preservation, which includes the right to continue and develop its existence.
4. The right to hold and acquire property.

It is not necessary to discuss the first fundamental right, which goes with the very creation and existence of a sovereign State.

Included in the second fundamental right, i. e., of self-government and jurisdiction, is comprised the right of jurisdiction over all persons and things within its territory, over all its ships on the high seas, over all pirates seized by its own vessels, and finally, a certain limited jurisdiction, as previously mentioned, over its citizens or subjects abroad in such countries as China, Korea, and certain South Sea islands.

The third fundamental right, that is, of self-preservation, contains the right of continuance and development of national existence, as well as other things. This matter of continuance and development of existence is not only a right with respect to other States, but it is also a duty on the part of a State to its own constituent members. Wheaton considers this duty the most solemn and important one which a State owes to its members.

Among the other rights included in the fundamental right of self-preservation is that of self-defense. This again includes the right to require military service from all of its people, to levy troops, to maintain a navy, to build fortifications, and to raise money to provide for all of these mentioned purposes.

Mutual rights of self-preservation and of self-defense have caused certain limitations to be agreed upon by States by treaty between each other. These limitations have taken various forms, such as the razing of the fortifications at Dunkirk, France, in 1763, the limitation of the establishment of arsenals in the Black Sea after the Crimean war, and—by arrangement between Great Britain and ourselves—the limitation in size and number of the naval vessels to be maintained upon the great northern lakes.

The right to continue and develop existence gives also, according to Hall, to a State the following rights:

(1) To organize itself in such a manner as it may choose.
(2) To do within its dominions whatever acts it may think calculated to render it prosperous and strong.
(3) To occupy unappropriated territory and to incorporate new provinces with

the free consent of the inhabitants, provided that the rights of another State over any such province are not violated by its incorporation.

The duties that correspond to the fundamental rights are those of good faith, a readiness to redress wrongs, a proper regard for the dignity and equality of other States, and a general good will and courtesy.

Section 8.—Recognition of New States.

The commencement of a State as a subject of international law dates from the time of its recognition as an independent State by existing sovereign States.

New States can become such in three general ways:

First. Uncivilized countries, upon attaining a sufficient degree of civilization and a good reputation for the performance of duties, can be recognized as eligible to the family of nations. Japan is a recent example of this recognition.

Second. Upon the formation of States by civilized men in hitherto uncivilized countries. The formation of Liberia and the Congo Free State are examples of this nature.

Third. Upon the recognition of independence as a State given as a result of successful revolution. The United States and the South American Republics are evidences of the formation of States by this method.

The first two methods require no further explanation, and we will concern ourselves with the last method only.

For the most part new States come into existence through successful rebellion. This has been the case with all existing American States and with many of the European States. When a rebellious community has practically attained its end, which is independence, and the mother country has ceased military operations against it, then, if the government and institutions of the new State appear regular and stable, it is recognized by third States as an independent State and a member of the society of nations. This is usually done either by entering into diplomatic relations with the new State or by negotiating treaties with it. The United States were recognized in 1778 by France by treaty, while the South American States were recognized by the United States in 1822 by a resolution of Congress to send diplomatic agents, and by England by making treaties. As a rule the mother country does not recognize the new State until a later time than other States.

The usage of international law in reference to the recognition of the independence of a State is that when the war for its subjugation has practically ceased and that it has a stable government the proper time has arrived. The commencement of a State as a subject of international law dates from this recognition of independence by existing States. Concerning this Hall says:

> States must be allowed to judge for themselves whether a community claiming to be recognized does really possess all the necessary marks, and especially whether it is likely to live. This, although the right to be treated as a State is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Effects of the recognition by the parent State and by third States.—Although, as a matter of equity and international law, the recognition by a parent State of the independence of a rebellious community is of no more value than that of third States, as a matter of fact it is of much greater value as conclusive evidence that the independence of this community is completed without further question.

Cases have occurred where third States have recognized the independence of a rebellious community prematurely, but such recognition has been generally followed by a declaration of war by the parent State upon the ground that such action places the third State in the position of an ally to the rebellious community, and hence of an enemy to the parent State. The alliance of France and the United States in 1778 is a case in point. John Quincy Adams gives a safe rule when he says:

> The justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty.

To have sufficient claim, then, for recognition as a separate nationality a community should have the attributes of a sovereign State as defined in section 4. It should possess and control a fixed territory, within which there is a definitely organized government, ruling in a civilized manner, controlling the obedience of its citizens or subjects and duly authorized by them to carry on dealings with the existing sovereign States.

Section 9.—Effect of a Change of Sovereignty.

(*a*) *Upon public rights and obligations.*—It is generally conceded that when a new State is formed by a separation from one already existing the rights which have been acquired and the obligations which have been contracted by the parent State adhere only to that State. This obtains in a general sense as a rule of international law. There are, however, modifications of this rule. One is that by special agreement obligations can be assumed in part, proportionately or otherwise. Another modification of the rule applies to local rights and obligations of the ceded territory, to boundary lines, and to the rights of navigation of rivers running through other countries besides its own. Certain local obligations may also be inherited, such as the regulation of channels, the levying of dues, payments of local debts or of debts guaranteed by local revenues. Property formerly owned by the parent State, whether in the form of land, buildings, collections of artistic or scientific objects, endowments, etc., lying within the boundaries of the new State, should belong to the latter State. In the matter of conquest or cession of territory the question of partition or nonpartition of the obligations of the parent State is a matter regulated by treaty or convention.

(*b*) *Upon private rights and obligations.*—It has been generally held, and especially by those whose acts create what may be looked upon as the continuous foreign policy of the United States, that rights and obligations of individuals are not affected by a cession or conquest of territory. They do not deny, of course, the right of a conqueror or new State to confiscate property for political offenses, or to withdraw franchises which by the principles of international law can be withdrawn by existing governments; but they do not allow a vacation of titles upon the ground that the law of the new State would not have granted such titles in the first instance.

Chief Justice Marshall puts the case in these words:

> It may not be unworthy of remark that it is very unusual even in cases of conquest for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be

generally confiscated and private rights annulled. The people change their allegiance, their relation to their ancient sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed.

Section 10.—De facto Governments.

Definition of de facto governments.—A de facto government or belligerent community is a political organization that has established itself, by regular hostilities or otherwise, to such a degree that it can exercise sovereign powers and be entitled to all of the rights of war and commercial intercourse. As a government de facto and not de jure, it has not all the rights of a sovereign and independent State. The recognition of a de facto government, as such, may be consistent with uncertainty as to its permanence. Without permanence, however, one of the essential attributes of a sovereign State is wanting.

Recognition of belligerency.—There are usually two prior stages through which a new community passes before arriving at independence; one is insurgency, the other belligerency. The same questions of international law arise in the case of all rebellions, whether it be the case of a colony or province attempting to secure its independence or whether it be the attempt of a party in a state to overthrow the existing government in order to take its place as ruling authority. In these cases the insurgent community may never get beyond the first stage, that of insurgency, as in the Brazilian insurrection of 1894. It may reach the second stage—belligerency—and get no further, as with the Confederate States in our civil war of 1861–1865, or it may gain its end as insurgents, never having been recognized as belligerents, as in the case of the Chilean insurgents in 1891.

There is at present a great deal of discussion as to the position of insurgents. Hitherto certainly they have had no standing in international law. In all of the older treatises on international law, and even in recent decisions of courts, they have been referred to as pirates if they were found upon the high seas.

Recent practice is opposed to this view, but the discussion of this special phase of the question will be deferred until the subject of piracy is considered.

As to the position of insurgents in general, it is agreed that they have no belligerent rights. Their war vessels are not received in foreign ports, they can not establish blockades which third powers will respect, and they must not interfere directly with the commerce of third states. Indeed, the hostilities which take place between the legal government and rebels is, strictly speaking, not war, and there are at present none of the legal consequences which war brings. For instance, there are no neutrals.

In two important rebellions of recent years in South America, that of Chile in 1891 and that of Brazil in 1894, a peculiar state of affairs existed. There was no recognition of belligerency in either case, and yet the rebels were given freedom of action by the third powers. Very often a state of affairs similar to this arises from the presence of international politics in such cases as distinguished from purely international law.

A question arose during the operations in Rio Harbor in the Brazilian insurrection which was virtually a new one. It was whether the insurgents in the course of regular hostilities, such as a bombardment of the city or an attack upon the Government forts, could practically prevent foreign merchantmen from moving about the harbor and from discharging and receiving cargoes at the regular places.

This was outside of the question of the right of a declaration of a blockade by the insurgents.

The decision of Admiral Benham, in command of the United States naval force, was to the effect that this could be done by the insurgents and that any movement on the part of American merchant vessels during the continuance of actual hostile operations was at their own risk. But any attempt upon the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted and that all possible protection was to be afforded such movements by the naval force of the United States assembled at Rio under his command. The establishment of this point, which seems to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action afloat, for insurgents.

The next stage beyond insurgency is that of belligerency. A community that has arrived at this point is generally known as a belligerent community and has attained the status of a de facto government. It has not, as previously stated, the rights of a sovereign and independent state.

The conditions necessary to belligerency are not so much principles as facts, while the grounds for the recognition of belligerency, or of belligerent communities as such, by third States are based upon possibilities or probabilities that the interests of the third States may be so affected by the existence of hostilities as to make a recognition of belligerency a necessary or convenient measure. If hostilities extend to the sea, or to its borders, such recognition becomes more pressing, as neutral powers have in time of maritime war to concede to belligerents certain rights which affect the freedom of action of their own citizens or subjects.

Dana says in his note to Wheaton:

> In such a state of things the liability to political complications and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers seem to require an authoritative and general decision as to the status of the three powers involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct; if it is not a war, they are to follow a totally different line.

In 1875, eight years after hostilities began in Cuba, President Grant, in his annual message, after defining belligerency in somewhat similar terms to those used in preceding pages, proceeded to describe the situation in Cuba in words which may be held to apply generally to cases where belligerent rights are claimed:

> I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own and to other States, with courts for the administration of justice, with a local habitation possessing such organization of force, such material, such occupation of territory as to take the contest out of the category of a mere rebellion or occasional skirmish and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it. The contest, moreover, is solely on land; the insurrection has not possessed itself of a single seaport, whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the consular officers of other powers, calls for the definition of their relations to the parties to the contest. Considered as a question of expediency, I regard the accordance of belligerent rights still to be unwise and premature, as I regard it to be at present indefensible as a measure of right.

When a State recognizes an insurgent community as having attained the state of belligerency the recognition is generally made by a formal

notification of neutrality, giving the date from which the State assumes the attitude of neutrality in the contest.

As to a parent State, the matter is in a different light. The parent State can not be expected to proclaim recognition of an insurgent community as a belligerent. It acts naturally in an indirect manner, and its relations toward the insurgents or rebels must be judged by these acts. A proclamation or establishment of blockade, an exchange of prisoners, and the enforcement of the rules of war as to the carriage of contraband by neutrals, etc., can be considered as manifest though indirect acts of recognition of belligerency by the parent State or regular government.

Relations of a belligerent community, become independent, to the contract rights and duties of the parent State.—Independence can not be considered as having been established by a belligerent community so long as a substantial contest is being maintained by the parent State or former government for the recovery of its authority. But this contest must be on a sufficient scale and so promising as to present reasonable grounds for ultimate success. A mere pretension of war or hostility will not keep alive the rights of the parent State and prevent the recognition of the new State by other States. This was shown in the case of Spain and her American colonies in the latter days of their struggle for independence.

When a belligerent community finally becomes independent, the relations toward the contract rights and duties of the parent State as to treaty obligations, property, and debts are the same as when a change of sovereignty occurs in a portion of territory of an old State by cession or conquest. This is discussed in the preceding section.

Upon the failure of a belligerent community to establish itself or maintain hostilities against the parent State, all of the rights and property acquired by that community become immediately vested, upon its suppression, in the parent State.

Section 11.—Territorial Property of a State.

The territorial property of a State, as the term is used in international law, consists of all the land and water over which the State has jurisdiction or control, whether the legal title be in the State itself or in private individuals.

Nature of the territorial title of a State.—The nature of the territorial title of a State in land owned by individuals or corporations is absolute, so far as it excludes other nations, but with respect to the subjects or citizens of its own State it is considered paramount only, and forms what is called the right of eminent domain; that is, as Wheaton puts it, the right, in case of necessity or for the public safety, of disposing of all property of every kind within the limits of the State.

A State, like a private corporation, is in law also a legal person and in its corporate capacity may have absolute ownership of property just as an individual in the State has ownership in his property. Thus arsenals, navy-yards, public lands, etc., are owned by the State and in some cases railways, telegraphs, and canals are also so owned.

This species of property so long as it is within the boundaries of the State plays no part in international law, but when found in a foreign State it is not subject to the jurisdiction of the owning State, excepting that kind of property which enjoys certain immunity known as exterritoriality. Ships of war and the hotels of ambassadors are instances of this kind. Indeed, other kinds of property of the State, such as

munitions of war, etc., if found within foreign territory have been held to be free from the ordinary process of law.

There is no difficulty as to specifying the property of the State on the land, when the boundaries are once fixed, but the rights of the State over waters are not so well defined.

Lakes and rivers wholly within a State are, however, unquestionably a part of the territorial property of that State. But with respect to bays and gulfs there is yet dispute; in other words, the historical development of the subject is not yet complete. As to marginal seas, a State can claim the narrow belt of water now universally conceded as territorial property, as a matter of necessity for the better security of its people on land and also for the enjoyment of its fisheries. This is a proper appropriation, because this marginal portion of the sea can be effectually commanded from the shore by modern artillery.

Section 12.—Extent of the Territorial Waters of a State.

At the time when international law began its existence as a science in the sixteenth century a large portion of the sea was claimed as mare clausum. This included a large part of the Atlantic, all of the seas about England, and also the Adriatic and Baltic seas. Grotius published his treatise entitled Mare Liberum in 1609, and a few years later Selden answered, advocating the right of England over the seas washing her shores; but from that period the interests of commerce demanded the freedom of the seas and gradually the exclusive claims were given up, until in the beginning of the nineteenth century the excessive pretensions of former times were reduced almost entirely to the 3-mile limit and to certain bays and gulfs of varying width and length.

In the long controversy over the right of the fisheries that was carried on between the United States and Great Britain it was attempted to exclude our fishermen from the Bay of Fundy, the bight of Prince Edward Island, Cow Bay, and other bodies of water of the maritime provinces of Canada. These claims have all been yielded by England, but she still claims the bays of Chaleur, Fortune, Conception, and other bays of Newfoundland as closed seas. The United States would probably take the same view in respect to the Delaware and Chesapeake bays, Long Island Sound, and similar waters of our own coast.

Among the last claims of extensive rights beyond the marine league limit were those made by Denmark for the exclusive fishing rights over a large water area around Iceland and those made by the United States over a large portion of the Bering Sea for the preservation of the seal fisheries. The claim of Denmark was finally relinquished in 1872, and in 1893 the international board of arbitration, sitting in Paris, decided that the control of the United States over any portion of the Bering Sea, for any purpose, was limited to the inclosed bays and gulfs of Alaska and by the marine league along its shore line.

The rule of the 3-mile limit was based originally upon the range of cannon; it has now become an arbitrary distance, in all probability too well established to be changed with the increasing range of cannon. Owing to this increased range of great guns restriction against target practice has been extended in the United States Navy to any points outside of this belt from which shots may fall within foreign territory.

Great Britain, from the position she once held of advocating exclusive claims over the seas that washed her shores, has become one of the foremost of the advocates of the 3-mile limit of jurisdiction upon

the high seas. This position was considered as legally established until the case of the *Franconia* arose in 1877.

The *Franconia* was a German merchant vessel, which, while bound from Germany to the West Indies, ran down an English merchant steamer off Dover within the 3-mile limit, causing loss of life and attended with circumstances which, under English law, amounted to the crime of manslaughter. The master of the German steamer was hence convicted of manslaughter, but an appeal was made upon the point of law that English courts had no jurisdiction over criminal offenses committed on board foreign vessels passing within 3 miles of the English shore. By a close majority the judges upheld this objection, after acknowledging the international rights over the 3-mile limit held by Great Britain; but in absence of express municipal legislation to that effect they declined to enforce the doctrine that the law of nations was adopted in its full extent by the common law and was in fact a part of the law of the land.

In consequence of this decision an act was passed by the English Parliament in the session of 1878, which adopted the views of the minority of the court, declaring that the rightful jurisdiction of the Queen extends, and has always extended, over the open seas adjacent to the coast of the United Kingdom and of all other parts of Her Majesty's dominions, to such a distance as is necessary for the defense and security of such dominions, and that it was expedient that all offenses committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law. In the same act the certain distance referred to was defined as one marine league measured from the low-water mark. It was further directed in the act that no proceedings were to be instituted against a foreigner without the consent and certificate of a secretary of state, or, in the case of a colony, the certificate of the governor. Walker says, in commenting upon this act of Parliament:

> Thus was reestablished in England the authority of international law on the footing on which the rest of the world had placed it.

In regard to the use of the marginal waters of a State or of straits exclusively under the territorial jurisdiction of a State, but connecting free and unappropriated waters, for purposes of navigation or "innocent passage," there seems to be no dispute. No European territorial waters of this description have been closed to commercial navigation for more than two hundred and fifty years, and during the nineteenth century no such waters have been closed in any part of the civilized world; hence the right may be considered to be completely established. Hall says:

> This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State; it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used. A State has therefore always the right to refuse access to its territorial waters to the armed vessels of other States if it wishes to do so.

What has just been quoted might be applied also to the status of any interoceanic canal if it were built and used for commercial purposes.

Besides the rights over its own territory a State sometimes acquires, by treaty or prescription, certain rights in the territory of other States, such as the right to navigate rivers and the right of fishery. With respect to both of these questions we have had long-continued and serious disputes with Great Britain. The first question arose with respect to the right to navigate the St. Lawrence River. The claim made by the United States was that this right rested upon the grounds of natural right and obvious necessity. On the part of the British Government it was denied that a perfect right to the free navigation of the St. Lawrence existed in accordance with the principles and practice of the law of nations. This controversy was ended by the reciprocity treaty of 1854, under which the citizens and inhabitants of the United States were permitted to navigate the river St. Lawrence and the Canadian canals between the Great Lakes and the Atlantic Ocean, and British subjects were granted the right to navigate Lake Michigan. This treaty was abrogated in 1866, but the matter was revived; and under the treaty of Washington, of May 8, 1871, it was provided that the navigation of the St. Lawrence from the point where it ceased to form the boundary between the two countries to and from the sea shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The same freedom to the navigation of the Yukon, Porcupine, and Stikine rivers was granted to both citizens of the United States and British subjects, and also for a limited term of years the freedom on the part of British subjects to the navigation of Lake Michigan. We need not now go into the question of the varying positions of Great Britain in this matter—so well described by a British authority, Phillimore, in his work upon international law—nor need we review the claim made by the Government of the United States that the St. Lawrence stood in the same position as a strait. The statement made by Pomeroy, sustained, as it is, practically, by Wheaton and others, probably covers the ground fairly. It is:

> The rule, which may now be deemed settled by the practice of nations, is that the people residing upon the upper waters of a river have no international right to navigate the same through the territories of another State; that it requires the special agreements of a treaty between the two governments to create, establish, and regulate such a right. Treaties containing stipulations of this nature have been made, and most of the great rivers of Europe are within the operations of such conventions.

The river La Plata, with its branches, the Parana and the Uruguay, was opened to general commerce during the period from 1851 to 1859, and the Amazon at a later date. By the act of the Conference of Berlin, in 1885, the principles of free navigation were extended to the Kongo and Niger rivers, in Africa.

In regard to bays, gulfs, and straits which are more than 6 miles wide many cases of serious controversy have arisen in which territorial jurisdiction has been claimed and disputed.

A supremacy claimed by the King of Denmark over the waters of the sound and of the two belts which form the outlet of the Baltic into the ocean was made a basis for the collection of duties or dues from vessels using these passages—duties which became famous in diplomatic and international law as "the sound dues." These dues became so great a burden to commerce that active opposition finally arose both in Europe and America, and the right of Denmark to collect

them was warmly disputed, especially in the United States. Denmark therefore, in 1855, suggested a project of capitalizing the sound dues, and in accordance with this suggestion a European congress met at Copenhagen and concluded a treaty by which, in consideration of the payment of a lump sum, these duties were to be forever abolished as regards ships of the nations joining in the treaty.

The United States declined to become a party to the treaty on the ground that Denmark did not offer to submit to the convention the question of her right to levy the sound dues and also that the proposition contemplated a political result—"the balance of power among the Governments of Europe." The United States, however, concluded a separate treaty with Denmark in 1857 by which a sum of money was paid to Denmark in consideration of her agreement to keep up lights, buoys, and pilot establishments, thus avoiding the recognition of the right of Denmark to collect the dues.

The navigation of the Bosphorus and the Dardanelles has been of late years another subject of dispute and treaty. The Ottoman Porte claimed the right to exclude other nations from navigating these passages which connect the Mediterranean and Black seas. This contention seemed well founded when all of the shores of the Black Sea were under the jurisdiction of Turkey, but since the acquisitions on that sea by Russia the claim is not a reasonable one. The right of free navigation for merchant vessels was recognized in 1829, but the right to prohibit foreign vessels of war from navigating these Turkish waters has been recognized by the European powers by treaty and otherwise.

By the treaty of Paris in 1856, as modified by the treaty of London in 1871, the Black Sea was thrown open to merchant vessels of all nations, but the straits mentioned are closed to ships of war except that the Sultan has the faculty of opening them in time of peace to the vessels of war of friendly and allied powers in case he deems it necessary for carrying out the stipulations of the treaty of Paris. The United States have never adhered to either of these treaties and have always maintained that their right to send ships of war into the Black Sea can not be legally taken from them by any arrangement concluded by European powers to which they are not parties. No attempt, however, has ever been made by the United States to insist upon such passage. American ships of war have, while reserving all questions of right, always asked permission of the Porte to pass the Dardanelles.

Bristol Channel has been held by English courts as an inclosed water under English jurisdiction, and Conception Bay, in Newfoundland, which is something over 15 miles wide at its mouth, has been held by the privy council to be a British bay; while in 1793 the Attorney-General of the United States held that Delaware Bay formed a part of the territorial waters of the United States. Hall says:

> On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any State would now seriously assert a right of property over broad straits or gulf of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay; or still more to small bays, such as that of Cancale.

Ports and roadsteads are of course under the sole jurisdiction of the State which possesses the coasts upon which they are situated. This property and jurisdiction, which does not interfere with the rights of other States to a free passage and use of the seas, is incontestable in international law. This territorial ownership carries with it, on the part of the State that possesses it, the right to declare these ports and roadsteads closed, open, or free, and the right to require without restriction and without regard to other nations that ships and merchandise arriving at the ports be subject to such customs and other regulations as it may deem proper. It is necessary, however, that the use of the ports and its regulation should be general in their character and without discrimination in favor of or against any nation; this is made obligatory by usage and international law in accordance with the right of equality possessed by all foreign States. A nation that should deny its ports to one nation without just reason while allowing its use by another would be wanting in its international duty and justly expose itself to complaints that would with reason bring on measures of retorsion. In principle, then, a port open to commerce is, as Calvo says, tacitly considered as accessible to ships of all other nations, and unless otherwise stipulated by treaty the free entrance permitted to merchant ships extends to vessels of war of friendly States. There might, of course, be special cirumstances which would justify a State in refusing vessels of war of other States admission to its ports or which allow such admission with limitations as to the time of entry, as to the number of vessels, and as to places for anchorage.

Regulations providing for these limitations have existed in very recent times as to the harbor of Vladivostok and the inner harbor of Singapore.

In time of war the use of the harbor of Spezzia by men-of-war is prohibited, and the Government of France has decreed also that in time of war, between sunrise and sunset, no foreign vessel, whether a man-of-war or merchantman, shall approach within less than 3 miles of the coasts of France or the French possessions, before having been authorized so to do, while between sunset and sunrise the prohibition to approach within less than 3 miles is absolute. (See Appendix.)

The admission of vessels of war to certain ports or anchorages is not only at times influenced by political considerations or certain international requirements which vary according to the time and place, but the question of anchorage is at times controlled by reasons of public order and security. Parts of harbors may be reserved for commercial, quarantine, or national purposes, for submarine mines or other means of local defense, and the port regulations may also forbid certain anchorages to vessels of war on account of danger from explosives carried by them.

Chapter II.

Territorial Jurisdiction of a State.

Section 13.—General Rule of Territorial Jurisdiction.

One of the fundamental rights of a sovereign State is absolute and exclusive jurisdiction over all persons and property within its boundaries. That there are some important exceptions to this rule does not disprove the rule itself, and beyond these few well-defined exceptions it is universally admitted and enforced, and upon the whole there is perhaps no more important practical rule of the law of nations. At the present time when, from motives of business or pleasure, citizens and subjects of the several States are at all times residing in or passing through States other than their own, there is almost constant occasion for the application of this rule. Citizens of one State going into the territory of another State subject themselves and their property to the jurisdiction of the latter in all respects as if they were its own citizens.

This rule being plain and simple, it needs only to be stated; the exceptions, however, require more extended discussion. The first exceptions are those known as immunities, or exterritoriality.

Section 14.—Immunities of Sovereigns.

Chief Justice Marshall says:

> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. * * * The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

And further:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the immunities belonging to his independent sovereign station will be extended to him.
>
> This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse * * * have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

These cases consist of the exemption of the person of the sovereign from arrest or detention within a foreign territory and the extension of the same immunities to ambassadors and all diplomatic agents.

The exemption of a sovereign, who is naturally in the position of a guest, from arrest, detention, civil process, or jurisdiction within a foreign territory is an immunity which explains itself as a matter of courtesy due to his official importance and dignity. He possesses this immunity while he is in the foreign territory in his capacity of a sovereign, and the members of his suite enjoy the same personal immunity as himself.

If a sovereign commits acts against the safety or good order of the State in which he is a guest or permits one of his suite to do so, the offended State can expel him from its limits, using such restraint only as becomes necessary for this purpose.

Section 15.—Immunities of Diplomatic Agents and Consuls.

In the case of ambassadors the theory formerly held was that they represented the sovereign personally, and immunities were accorded them for the same reasons as for sovereigns themselves. But this theory did not hold in respect to diplomatic agents of lower rank, and when republics began to come into existence in the modern era the diplomatic agent represented the State and not the personal sovereign. To account then for their immunities the lawyers invented the fiction of exterritoriality; that is, that the diplomatic agent carries with him a portion of his own country, and thus constructively is still under the jurisdiction of his own State.

The law and usage of nations, however, is now so well established upon this point that it needs no fiction to support it, and it is the tendency of recent writers to explain this position of diplomatic agents on grounds of expediency, freedom from local jurisdiction being necessary for the full and efficient performance of their duties. No doubt, too, tradition and custom give additional weight to the rule.

As to the extent of the immunities of diplomatic agents, the general law is settled by a long series of adjudicated cases to the effect that they are not subject to either the criminal or civil jurisdiction of the place of their residence. The only crime for which an ambassador may be arrested and detained, if necessary, is that of conspiracy against the safety of the State, and then he is to be sent out of the State.

A diplomatic agent can not be forced to give evidence in a court as a witness, though sometimes, as in the case of the trial of Guiteau, this right is waived, by the consent of his Government, as an act of courtesy and justice.

A diplomatic agent who engages in trade in the country to which he is accredited does not thereby forfeit the privileges and immunities accorded to diplomatic agents, but when he voluntarily appears in compliance with a writ and submits himself to the jurisdiction of a court, the court is not bound to interfere for his relief on account of his official position.

The immunities of ambassadors and diplomatic agents are extended to their immediate families and their official suite. Generally it is considered that the immunities of his position extend to his servants, not on account of their diplomatic character, but because of their necessity to the dignity or comfort of the diplomatic official. Great Britain does not recognize this immunity of the servants of a diplomatic agent.

The residence of an ambassador or diplomatic agent is regarded as

inviolable except in cases of great extremity, different States varying as to the extent of its inviolability. Freedom of religious worship is permitted within the residence of an ambassador, even when otherwise prohibited. Subjects of a country are not permitted to attend if such attendance would be in violation of the law of the country. The official residence is free from taxes, but not from charges for light and water. By courtesy most nations permit the entry free of duty of goods intended for the private use of a diplomatic agent.

A recent occurrence in London is perhaps worthy of mention in connection with the immunity of the residence of diplomatic agents. An educated Chinaman, named Sun yat-Sen, charged with conspiracy against the Viceroy of Canton, was seized in or near the Chinese legation in that city and detained there, it is said, with a view of deporting him to China. The English Government naturally considered this an abuse of the immunity of the legation, such immunity giving no right to exercise either powers of imprisonment or those of criminal jurisdiction, and demanded the release of Sun yat-Sen, which was complied with.

The expression "ambassadors and other public ministers" in the Constitution of the United States is construed as comprehending all officials having diplomatic functions, whatever their title or designation.

Consuls are not diplomatic agents. The laws of the United States forbid the exercise of diplomatic functions by consuls unless expressly authorized to do so by the President of the United States.*

In non-Christian and semicivilized countries, however, as they are clothed with judicial functions, they have to a certain degree privileges like diplomatic officials. Besides their prerogatives of jurisdiction they enjoy the right of free religious worship and to an extent the right of asylum. They are exempt from both the civil and criminal jurisdiction of the countries to which they are sent, and they are protected in their household and consular residence. They are exempt from taxation, so far as their personal property is concerned, and in general from all personal impositions that arise from the character or quality of a subject of the country.

A consul, not engaged in business, who is sent to a Christian or civilized country has the right to place the arms of his Government over his door. Permission to display the national flag, strictly speaking, is not a right, but is usually accorded, and is often provided for by treaty or convention. A consul, under the circumstances named, can claim inviolability for the archives and official property of his office and their exemption from seizure or examination. He is protected from the billeting of soldiers in the consular residence, and he can claim exemption from services on juries, in the militia, and from other public duties required from the citizens or subjects of the country to which he is sent. The jurisdiction allowed to consuls in Christian and civilized countries is voluntary, and relates more especially to matters of trade and commerce.

A consular convention is generally made with every country to which consuls are sent, and under these treaties or conventions other privileges are exercised, but so far as international law is concerned the immunities are those first given.

If a consul is engaged in business, and especially if he is a subject of the State in which he officiates, his privileges are still further cur-

*See Rev. Stat. U. S., sec. 1738.

tailed, and so far as his personal status is concerned, it is doubtful whether under the rules of international law he can claim any immunity beyond any other subject.

Section 16.—Immunities of Ships of War and Armed Forces.

The organized armed forces of a State, representing its sovereign power, are never subjected to the jurisdiction of another State if they are temporarily within its territory. An army is never allowed to cross the boundary of a friendly State without the express permission of that State.

The march of an army through a district, even with all possible precautions against injuries to private citizens and their property, is a grave matter. Since railroads have come into use, however, the objections on that score would not be so great, since an army may be transported by rail through a friendly country with little or no danger to the inhabitants. But it is extremely rare for an army to enter the territory of a foreign State without hostile purpose.

As to ships of war, the case is different. Their mere presence in a foreign friendly port occasions no damage or inconvenience. Therefore, not only is no license required, but if there be no express prohibition, the ports of every nation are considered as open to the public ships of war of all powers with whom it is at peace, and such ships in friendly ports enjoy to the fullest extent the right of exterritoriality. Their immunity from local jurisdiction has come to be more absolute than that of the official residence of ambassadors, and probably for the reason that they have the efficient means of resistance which an ambassador has not.

In a note to Wheaton, Dana says:

> It may be considered as established law, now, that the public vessels of a foreign State coming within the jurisdiction of a friendly State are exempt from all forms of process in private suits. Nor will such ships be seized, or in any manner interfered with, by judicial proceedings in the name and by authority of the State, to punish violations of the public laws. In such cases the offended State will appeal directly to the other sovereign. Any proceeding against a foreign public ship would be regarded as an unfriendly, if not hostile, act in the present state of the law of nations.

The rules as to ships apply to all tenders, boats, or other flotilla belonging to vessels of war and detached therefrom upon any service, but when the officers or men of a vessel of war are in shore boats or reach land, they are under the local jurisdiction.

The tribunal of arbitrators at Geneva held that the principle of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations. Hence the crew and other persons on board of a vessel of war in foreign waters can not ignore altogether the laws of the country in which she is lying as if she constituted a territorial close. Acts beginning and ending on board of the ship and having no effect external to her are not subject to the territorial jurisdiction of the port. In relation, however, to matters external to the ship the exemption from the local jurisdiction is not so complete. A vessel of war must not appear as a disturbing agency in the ports of a friendly State, nor allow herself to be used as a center of disturbance by others. She must conform to the rules of the port relating to quarantine, anchorages, etc., unless there be a special usage to the contrary. On the other hand, she is exempt from visitation and search

by the customs officials of the port. By the regulations of the United States Navy, commanding officers are strictly forbidden to allow an examination of their ships by foreign customs officers.

As a rule, when persons belonging to a vessel of war fail to respect the laws of the country when on board of their vessel, the offended State, as Mr. Dana says, should appeal for redress to the other Government through the proper diplomatic officials.

It must not be understood, however, that this doctrine of the immunity of a ship of war goes so far as to deprive a State of all power over the acts of a public foreign ship. Entrance into the harbors of the State may be denied to any ship refusing to respect the local laws; her stay may be limited; she may be ordered to depart, and if necessary force may be used to expel her, as in the case of an ambassador. Such expulsion is provided for by statute law in section 5288 of the Revised Statutes of the United States, in which the President is empowered to use for this purpose the land and naval forces of the United States or the militia thereof.

When a vessel of war is in a foreign port her commanding officer retains his full authority to maintain order and punish offenses committed on board. But in the case of crime committed on board by persons not belonging to the ship's company it is generally conceded that the commanding officer may with propriety hand over the parties to the authorities of the port. If both the offender and the injured are citizens of the State owning the port it would seem to be his duty in ordinary cases to hand over the criminal. The same principle applies to ordinary criminals seeking to escape the punishment of their crimes by taking refuge on board vessels of war. It is wrong to harbor them; the privilege of refuge is only for persons who are pursued for political offenses. But the surrender is, in all cases, at the discretion of the commanding officer. The accused person can not be taken out of the ship without his order. The sovereign of the port has no right of seizure or arrest on board of foreign vessels of war in any case whatever. Delivery of the offender may be requested, but in case of refusal further proceedings looking toward the surrender must be by way of diplomatic representations to the State whose vessel of war is concerned.

Hall says:

> The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the State for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from local jurisdiction.

Pomeroy, an American jurist, says:

> If a ship of war is abandoned by her crew, for example, she becomes merely property, but if any officer or member of the crew while on the land should make himself culpable by an infraction of the laws of the country there is no doubt whatever that the local authorities have jurisdiction over such persons while they remain on shore and may cause them to be arrested before they quit the land, and to be punished according to their own laws. But the commanders of the vessels should be immediately informed of the arrest and the causes which led to it, in order that either they or the diplomatic agents of their Government may make all necessary endeavors either to procure that the persons accused should be returned to them or to watch the manner in which they are treated and tried.

If the offender, however, escapes to his vessel, he can not be apprehended there by the local authorities, but the commanding officer can, if he sees fit, without loss of dignity, surrender the offender for trial and punishment by the local courts, having the case watched by his own or a consular representative.

Proceedings for salvage can not be taken against a foreign public vessel. In January, 1879, the United States frigate *Constitution*, laden with goods which were being taken back to the United States at the public expense from the Paris Exposition, went aground upon the English coast. Assistance was tendered by a tug; and a disagreement having taken place between its owner and the agents of the United States Government as to the amount of the remuneration to which the former was entitled, application was made for a warrant to issue for the arrest of the *Constitution* and her cargo. The United States Government objected to the exercise of jurisdiction by the court; the objection was supported by the counsel on behalf of the English Government; and the application was refused by the judge, Sir R. Phillimore, on the ground that the vessel being a war frigate of the United States Navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of that country.

Hall says:

> Besides public vessels of the State, properly so called, other vessels employed in the public service and property possessed by the State within foreign jurisdiction are exempted from the operation of local sovereignty to the extent, but to the extent only, that is required for the service of the State owning such vessels or property.

Thus, to take an illustration from a case which, though municipal, was decided upon the analogy of international law, a lien can not be enforced upon a lightship, built for a State in a foreign country.

The ship herself is exempt from the legal process, but persons on board such vessels are subject to the local jurisdiction for offenses against the peace of the port.

During time of war the ordinary privileges of a port may, without discourtesy, be restricted or suspended by military necessity.

In case of a violation of the neutrality of a port or ports of a State by a belligerent vessel or vessels of war, it is not improper for the injured State to deny the hospitality of its ports to such vessels during the continuance of hostilities. This was done by the Empire of Brazil during our civil war.

Cases have occurred in connection with vessels of the United States in years past that illustrate violations of the local jurisdiction of ports and territory of foreign States. In 1866 and 1867, at the Brazilian ports of Rio de Janeiro, Pernambuco, and Maranham, attempts were made to capture deserters on shore in violation of the territorial jurisdiction.

In Maranham an officer from a man-of-war discharged the contents of a revolver in the streets of the city while in pursuit of a deserter from his boat. For this breach of the peace he was arrested, whereupon his commanding officer claimed redress for this ordinary and proper exercise of municipal power. This claim was improper under the circumstances.

In Rio an officer was sent on shore by his commanding officer to arrest deserters, and recognizing one in the streets of the city, attempted his arrest, and upon his running away wounded him in such a manner that the man subsequently died in hospital. In this case the officer concerned, who was arrested by the local police, was held and duly tried for murder, though subsequently released. In this assertion of its sovereign rights the Brazilian Government was entirely justified by international law.

It is especially enjoined upon the officers and men of the United States Navy by the regulations which govern them that the territory and territorial authority of foreign civilized nations in amity with the

United States shall be scrupulously respected. The landing of men to capture deserters or of armed forces for any purpose is forbidden, as well as the granting of leave to large bodies of men without the permission or knowledge of the local authorities.

The question of affording asylum on board of vessels of war in foreign ports is discussed separately elsewhere.

Section 17.—Immunities of Merchant Vessels.

According to the general interpretation of the rules of international law a merchant vessel lying in a foreign port is as completely under the jurisdiction of that foreign State as a citizen of another State would be on land.

The rule held by the French, however, is different, the French view being that the crew of a merchant ship lying in a foreign port is not like a party of isolated strangers traveling in a foreign country, but that it is an organized body of men, governed internally by laws of their country, enrolled under its authority, and placed under an officer who has a standing and a recognition by law. Hence, although the merchant vessel is not a representative of the national government, nor a public vessel, yet it carries about it a sort of national atmosphere which it does not lose in foreign waters. The French Government and courts, holding this view, find a distinction between acts and offenses connected with the internal order and discipline of the ship, when the peace of the port is not disturbed, and other acts which have an external effect, either directly or indirectly. The former they leave to the laws of the State to which the ship belongs; the latter they regard as subject to the laws of the port.

For example, the French courts have taken jurisdiction in the case of murder committed on board of a foreign merchant vessel in a French port, though both the murderer and his victim were members of the crew. This was done upon the ground that a crime of such gravity amounts to a disturbance of the peace of the port. Crimes committed on board by or upon persons not belonging to the ship are, according to the French view, punishable under the law of the port. Whatever doubts may exist as to assuming jurisdiction over the internal affairs of vessels lying in the stream, there seems to be more reason for exercising local jurisdiction when vessels are secured to the shore or wharves of a foreign port, a position giving such continuity with the land and the inhabited portions of foreign territory as to make a closer relationship with its jurisdiction and its affairs. The Supreme Court of the United States decided, for instance, in the case of a Belgian steamer moored to a dock at Jersey City, that crimes of such a nature as to disturb the tranquillity of the port or the peace and dignity of the country should be dealt with by the courts of the country at whose port the merchant vessel is lying.

Vessels passing through, or anchoring in, the territorial waters of a State are theoretically in the same position with respect to the jurisdiction of the State as vessels lying at anchor in ports or harbors of the State. In the one case, as in the other, the State may be affected by external acts of those on board. As regards the coast waters, there may be danger of smuggling, of trespassing on fisheries, of reckless navigation, of collision, of contagious diseases, etc., just as in the ports there is the necessity of preserving the peace and of enforcing the customs laws and harbor regulations. But so far as the internal life of passing ships is concerned there seems to be little reason for

interference with foreign vessels using in this manner the territorial waters bordering the seacoast of the State.

As to such vessels Hall says:

> The state is both indifferent to and unfavorably placed for learning what happens among a knot of foreigners so passing through the territory as not to come in contact with the population. To attempt to exercise jurisdiction in respect to acts producing no effect beyond the vessel, and not tending to do so, is of advantage to no one.

It has been held by our courts and by the State Department that the United States hold no jurisdiction over offenses committed by foreigners against each other upon the high seas, and the remarks made by Judge Betts in the case of the *Reliance* would not be inappropriate to the matter referred to in the last paragraph. He said:

> In my judgment it would be lamentable if courts were compelled to defer the business of citizens of the country to bestow their time in litigation between parties owing no allegiance to its laws and contributing in no way to its support.

Notwithstanding a tendency on the part of many nations, including the United States, to favor the French rule as to exemption from the jurisdiction of the port in the internal affairs of a merchant vessel when the peace or laws of the port are not affected, still this tendency is not authoritative unless supported by a special consular convention or treaty. The United States have made conventions of this kind, conferring on consuls jurisdiction over disputes between masters, officers, and crews of merchant vessels, with Austria-Hungary, Belgium, Colombia, Denmark, Santo Domingo, France, Germany, Greece, Italy, the Netherlands, Portugal, Russia, Salvador, Sweden and Norway, and Tripoli.

Until this tendency becomes accepted as a general usage and rule, the position of the United States may be given in the words of the late Chief Justice Waite in 1875, as follows:

> As to the general law of nations, the merchant vessels of one country visiting the ports of another for the purpose of trade subject themselves to the laws which govern the port they visit so long as they remain, and this as well in war as in peace, unless it is otherwise provided by treaty.

Section 18.—Right of Asylum.

(*a*) *In legations and consulates.*—In the United States and in Europe, with the occasional exception of Spain, the rule may be considered as established that a legation does not grant asylum either to ordinary criminals or to persons charged with offenses against the state. In Spanish-American States the usage is different. Spain is the only European country which of late years may be said to have at times shared this usage with the Central and South American Republics and certain semicivilized countries.

A Spanish decision, however, that of the council of Castile in the case of the Duke of Ripperda, in 1726, is often quoted as stating the merits of this question clearly and logically. The question submitted to the council was whether, without a violation of the law of nations, the Duke of Ripperda, charged with treason, could be forcibly taken from the English legation at Madrid. The reply of the council was in the affirmative on the following grounds:

> To act otherwise would be to employ a system which has been adopted to facilitate the intercourse of sovereigns for the destruction and ruin of their authority. To extend the privileges accorded to the hotels of ambassadors, in favor of merely ordinary offenses, to persons intrusted with the finances, the powers, and the secrets

of a state, when they have betrayed the duties of their office, would be to introduce into the world a principle most injurious to all nations. If this maxim were to become the rule, sovereigns would be obliged to see maintained at their own courts those persons most actively engaged in machinations for their ruin.

In 1875 Secretary Fish addressed a letter to the minister from Haiti which contained the following:

The right to grant asylum to fugitives is one of the still open questions of public law. The practice, however, has been to tolerate the exercise of that right not only in American countries of Spanish origin, but in Spain itself, as well as in Haiti. This practice, however, has never addressed itself to the full favor of this Government. In withholding approval of it we have been actuated by respect for consistency. * * * It is believed, however, to be sound policy not to expose a minister in a foreign country to the embarrassments attendant upon the practice. Still, this Government is not by itself, and independently of all others, disposed to absolutely prohibit its diplomatic representatives abroad from granting asylum in every case in which application therefor may be made.

The printed personal instructions to the diplomatic agents of the United States in 1885 contain the following:

In some countries, where frequent insurrections occur and consequently instability of government exists, the practice of exterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents, and is practically recognized by the local government to the extent even of respecting the premises of a consulate in which such fugitives may take refuge. This Government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its agents to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct its representatives that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice.

Consuls have not, of course, the full immunities or exterritorial rights that pertain to diplomatic agents; but, as mentioned in the preceding instructions, a usage has grown up to such an extent in certain countries with respect to an asylum in consulates that its recognition as a fact can not be avoided. A consul who to save life permits such asylum does it upon his own responsibility, and, if the usage of the place permitted it, would be sustained in all probability to that extent by the Government of the United States.

In general terms, the position of the United States may be said to be one of toleration rather than of encouragement, and though our Government is indisposed to forbid its agents to deny temporary shelter to persons whose lives are endangered by mob violence or a coup d'état, it will not permit its diplomatic or consular representatives to offer such asylum or to encourage a resort to its consulates and legations for that purpose.

(*b*) *On board of ships of war.*—Under the general rule of respect for the laws of a friendly state it is considered wrong by the usages of international law to afford an asylum to a criminal or to a person charged with a nonpolitical crime. Of course a commanding officer must judge for himself whether the crime charged as nonpolitical is used as a pretext to prevent asylum being received by a person flying for his life on account of his political acts. If, however, a criminal of any kind succeeds in getting aboard a vessel of war he can not be apprehended or followed on board the vessel by the police or local authorities. No such entry can be made or allowed for any purpose whatever.

If a political refugee is granted asylum from motives of humanity, the right to protect him in certain localities has become established by usage. Asylum should not be offered, but can be granted under cer-

tain circumstances; but under no circumstances should any discrimination be made between political parties, nor should political refugees be allowed to maintain communication with the shore for political or other purposes.

The French give to their naval officers the right to refuse asylum under any circumstances, but forbid them to permit any pursuit or search on board of their vessels by the local authorities if the refugee is once given asylum. A refugee can properly only be delivered up in this case by means of the system of extradition, the delivery being granted upon the request of the government concerned.

The French rules state that the commanding officer has the moral duty of receiving political refugees, but upon condition of observing strict neutrality between the two parties. He is to be as humane and generous toward one side as the other, to be vigilant in preventing any communication on the part of the refugees with the shore, and to land them, as soon as circumstances will permit, in a place where they will be in complete security.

The British rule is given in the Instructions of the British Admiralty (1893) in article 448, as follows:

(1) Ships of war in the ports of a foreign country are not to receive on board persons, although they may be British subjects, seeking refuge for the purpose of evading the laws of the foreign country to which they may have become amenable.

(2) During political disturbances or popular tumults refuge may be afforded to persons flying from imminent personal danger. In such cases care must be taken that the refugees do not carry on correspondence with their partisans from Her Majesty's ships, and the earliest opportunity must be taken to transfer them to a place of safety.

(3) Except in extreme cases passages should not be given to the subjects of foreign governments.

(4) Whenever circumstances may permit, naval officers should communicate with Her Majesty's diplomatic or consular servants before taking steps for the reception of refugees on board their ships.

The regulations of the United States Navy direct as follows:

Article 288. The right of asylum for political and other refugees has no foundation in international law. In countries, however, where frequent insurrections occur and constant instability of government exists, local usage sanctions the granting of asylum, but even in the waters of such countries officers should refuse all applications for asylum, except where required by the interests of humanity in extreme or exceptional cases, such as the pursuit of the refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

By article 28 of the general act of the Brussels Conference relative to the African slave trade, signed July 2, 1890, and ratified by almost all of the civilized powers, the United States being among the number, it was agreed that "any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory powers shall be immediately and definitely freed; such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offense at common law."

(*c*) *On board merchant vessels.*—Merchant vessels having no immunity from foreign jurisdiction can not, by the rules of international law, properly grant asylum to political or other refugees. Such custom, if permissible, would lead to great abuses.

Even in the case of ships of war it is to be exercised with great caution. But ships of war are public vessels, with responsible commanders, and under direct and constant control of governmental authority. In the arguments advanced in favor of an asylum on board merchant vessels in the very few cases on record the flag seems to be the chief thing considered. Once under the flag of a foreign

State it is claimed that the refugee should be considered as free. It is doubtful whether those who advocate the right of asylum in merchant vessels would go so far as to hold that refugees may escape directly from their own State to foreign merchant vessels at anchor in their own ports.

Thus far this claim has been advanced only in the case of political refugees who, having escaped to another country, embarked on a merchant vessel for passage to a third country, by a voyage which included calls at the ports of their own country. But any person entering the jurisdiction of his own State does it knowingly and at his own risk. When, instead of preserving the asylum and refuge gained by reaching a foreign country, he deliberately exposes himself to arrest and punishment by entering the territorial waters of the country in which he is considered an offender he has no claim to the protection of any other State.

In the case of Sotelo, a Spanish ex-minister arrested on board of a French mail steamer plying between Marseilles and Gibraltar in a Spanish port, and also of another Spanish subject arrested as a passenger on board of a vessel under the British flag in a Spanish port, both the French and the English Governments decided that the Government of Spain was simply exercising a right which appertained to that State.

In the case of Gomez, a political fugitive from Nicaragua, Secretary Bayard took the same ground, that a merchant vessel was amenable to the jurisdiction of the port to which it had repaired for purpose of trade.

In the Barrundia case the facts were as follows: General Barrundia had been attempting to stir up from the Mexican border an insurrection in Guatemala while the latter State was at war with Salvador. When, upon the complaint of the Guatemalan Government, the Government of Mexico required Barrundia to leave the borders of Guatemala, he proceeded to Acapulco, a Mexican port, and with two of his followers, who subsequently landed in Salvador, embarked on board an American mail steamer, ostensibly for Panama, but it may be considered from the attending circumstances and with reasonable certainty for Salvador. Upon reaching a Guatemalan port his arrest was determined upon by the Guatemalan authorities. The master of the mail steamer declined giving him up without the authority of the American minister resident at Guatemala. When the letter of the minister was received advising the master to give Barrundia up to the Guatemalan officials and stating at the same time that the Guatemalan Government had promised that his life would be spared, the arrest was permitted; but Barrundia, resisting arrest, was killed. The American minister was removed for authorizing the arrest and the senior naval officer of the United States in port relieved from his command for not offering an unsolicited asylum to Barrundia on board of his vessel.

The Guatemalan Government desired the arrest of Barrundia upon the stated grounds of self-preservation, and held also that for this reason Barrundia was not to be allowed to go out of their jurisdiction until peace was declared with Salvador.

If it be claimed in this case that Barrundia possessed immunity from arrest because he was on board of a merchant vessel carrying the American flag, it is hardly too much to say that there is no foundation in international law for this position. The only possible excuse for this claim is the assertion that the Spanish-American States do not possess all the rights of sovereign States, and that there should be

an exceptional rule adopted in their case in regard to an asylum on board merchant ships, as there is in the case of legations.

It is suggested by Prof. John B. Moore that in view of the character that mail steamers are assuming as subsidized steamers of national and almost public character, sailing on regular and long-established schedules, that there should be positive treaty agreements between the governments concerned that their status in these respects should be similar to vessels of war. He says:

> A precedent for such negotiations might have been found in the postal convention between France and Great Britain of September 24, 1856, by which it is provided that vessels chartered or subsidized by government when employed in the service regulated by the treaty shall be considered and treated as vessels of war, and that passengers admitted on board such vessels who do not think fit to land shall not under any pretext be removed from on board, be liable to search, or subjected to the formality of a visé of their passports.

Section 19.—Jurisdiction Over Exterritorial Offenses.

A number of European States, among them being France, Belgium, Germany, Austria, Italy, the Netherlands, Sweden and Norway, and Russia, allow their tribunals to take cognizance in certain cases of crimes committed by foreigners in foreign jurisdiction or out of their territorial bounds. The crimes aimed at are, for the most part, those committed against their own subjects in foreign parts, and "offenses against the safety of the State." This claim of jurisdiction is not favorably looked upon by the leading American and English publicists, and is rejected by a number of States, the United States being among the number.

Hall says, very sensibly, concerning this usage:

> Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a State which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. * * * To assert that this right of jurisdiction covers acts done before the arrival of foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other States as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support.

The decision of the United States in the Cutting Case gives the last precedent in this country as to the jurisdiction of the courts of one State over acts of foreigners in a foreign State. Secretary Bayard wrote upon this subject as follows:

> The Government is still compelled to deny what it denied on the 19th of July (1886) and what the Mexican Government has executively and judicially maintained, that a citizen of the United States can be held under the rules of international law to answer in Mexico for an offense committed in the United States simply because the object of that offense happened to be a citizen of Mexico.

The inclusion of political offenses in this claim of jurisdiction over acts done in other countries makes it unlikely that countries which value political liberty and their right of asylum will easily admit the claim. On the other hand, the claim is now embodied in the municipal legislation of so many countries that it must be admitted that the common-law doctrine of the territoriality of crime is by no means so universally recognized as to warrant the assumption that it is a settled rule of international law.

There is an exception to the ordinary rules of territorial jurisdiction, which rests upon treaties and not upon the rules of international law, in the cession of jurisdiction over citizens and subjects of fully civilized States when residing in semicivilized and non-Christian

countries like China, Japan, Korea, and Siam in Asia, the Barbary States in Africa, Turkey, and certain islands in the South Seas.

This exceptional practice arises either from the defective and, to us, unusual character of the administration of justice, or from the inferior position assigned to Christians in Mohammedan countries. The jurisdiction over the citizens and subjects of Christian countries is now held by the consular courts of the various countries, which exercise both civil and criminal jurisdiction. In case of criminals the accused is tried in the consular court of his own country, while, if the criminal is a subject of the local sovereign, he is tried in local courts; but in civil cases between subjects of different countries the case is tried in the consular court of the defendant, while in civil suits between a foreigner and a native the trial is generally before a mixed tribunal. In Egypt, since 1876, a system of mixed tribunals has taken the place of the consular courts. The rules as to tribunals and procedure vary in different countries and are provided for in the various treaties.

Section 20.—Extradition.

Kindred to the subject of the right of asylum in legations and vessels within the territory of the fugitive's State is the question of the right of asylum of fugitives who reach the territory of a foreign State. But that brings up the whole subject of extradition, which comprises the cases of common-law criminals as well as of political refugees. Extradition treaties are of recent origin. The first treaty by us providing for extradition was made in 1794 with Great Britain. Before the introduction of treaties criminals of one country were usually safe if they succeeded in escaping to the Territory of another State, but it may be said in extenuation of this that there was less intercourse and less facility for escape then than now. The next treaty made by the United States was in 1842, but from that time the practice of making treaties upon this subject has grown steadily, until now the United States have in force treaties providing for extradition with most of the civilized States of the world.

The first question that arises upon this subject is whether, strictly speaking, extradition is a matter of international duty. The answer must be in the negative, but the opinion of the civilized world favors extradition, and it may become, before long, agreed upon as a duty of that kind.

As a matter of fact there have been cases of extradition made, under special circumstances, without treaty. In 1864, Argüellos, governor of a district in Cuba, sold a number of freed Africans into slavery by means of forged papers and then escaped to New York. There was no treaty of extradition between Spain and the United States, but the Spanish Government requested his arrest and surrender as an act of comity, not only on account of the enormity of the offense, but because his presence in Cuba was necessary for the liberation of the persons sold into slavery. Secretary Seward, with the sanction of the President, ordered the arrest and surrender as an Executive act, without giving opportunity for judicial inquiry into the legality of the proceeding. The surrender of Tweed was an act of comity on the part of Spain of somewhat similar nature.

But in the case of the United States *v.* Rauscher, in 1886, the Supreme Court, after an elaborate and exhaustive discussion, decided, in an opinion delivered by Justice Miller:

(1) That there was no rule of international law requiring States to deliver up fugitives from justice from other States.

(2) That in the United States the question of extradition was exclusively a Federal one.

(3) That a person extradited under treaty can be tried for that offense only for which he was extradited.

Woolsey says:

The case of political refugees has some points peculiar to itself. A nation, as we have seen, has a right to harbor such persons, and will do so unless weakness or political sympathy lead it to the contrary course.

Questions often arise as to the definition of political offenses. In the case of the St. Albans raid from Canada, in 1864, in which the bank was pillaged, private property seized and burned, etc., the Canadian Government held that as the person in command held a Confederate commission the offense was a political one.

Similar opinions have been held by our authorities in regard to risings within Mexican territory near our border. In the case of Castioni, which involved the killing of a Swiss councilor, it was held by the English courts that the act was not of murder, but had a political character, the ground taken being that the fatal shot was fired with the purpose of advancing and furthering the object of the rising against the local Government, and hence the offense was a political one.

The United States have recently entered into treaties of extradition providing that an attempt against the life of the head of a foreign Government or his family shall not be considered a political offense or an act connected with such an offense.

A case has recently occurred in which both the right of asylum and extradition for political offenses were involved. It is referred to in the annual message of the President of the United States for 1894 in the following terms:

The Government of Salvador having been overthrown by an abrupt popular outbreak, certain of its military and civic officers, while hotly pursued by infuriated insurgents, sought refuge on board the United States war ship *Bennington*, then lying in a Salvadorean port. Although the practice of asylum is not favored by this Government, yet in view of the imminent peril which threatened the fugitives, and solely from considerations of humanity, they were afforded shelter by our naval commander; and when afterwards demanded under our treaty of extradition with Salvador for trial on charges of murder, arson, and robbery, I directed that such of them as had not voluntarily left the ship be conveyed to one of our nearest ports, where a hearing would be had before a judicial officer in compliance with the terms of the treaty. On their arrival at San Francisco such a proceeding was promptly instituted before the United States district judge, who held that the acts constituting the alleged offense were political, and discharged all the accused except one Cienfuegoes, who was held for an attempt to murder. Thereupon I was constrained to direct his release, for the reason that an attempt to murder was not one of the crimes charged against him and upon which his surrender to the Salvadorean authorities had been demanded.

Section 21.—Exterritorial Acts by Order of the State.

These acts, when committed by an individual or by a body of individuals under orders of the government of a State, are acts for which the individual can not be held responsible. The responsibility rests with the State ordering the violation of territory.

Acts of this nature are classed as hostile and operations of "imperfect war" by some writers on international law, and can only be justified by the right of self-preservation and self-defense. As Mr. Webster said in his correspondence with Lord Ashburton with respect to the *Caroline* affair, there must exist, and be shown to exist, "a necessity for self-defense instant, overwhelming, and leaving no choice of means

and no moment for deliberation," and it should further appear that the agents of the Government taking part in the exigency "did nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."

The case known as the *Caroline* case was as follows:

During the disturbances in Upper Canada in 1837 an American steamer called the *Caroline* had been actively engaged in carrying arms, etc., from the American side of the Niagara River to the Canadian rebels. While lying on the American side of the river the *Caroline* was boarded by a party of Canadian loyalists, set on fire, and sent down the stream, finally going over the falls of Niagara and being dashed to pieces. An American citizen was killed in the affray and several others wounded. One of the party of loyalists—McLeod by name—was arrested afterwards while within the territory of New York and thrown into prison on the charge of having been concerned in the destruction of the *Caroline* and the alleged murder of the American who was killed on board.

The British Government made demand for his release upon the grounds that it was responsible for McLeod's acts, and that the transaction in which he had been engaged was of a public character, planned and executed by persons duly authorized by the colonial government to take such measures as might be necessary for protecting the property and lives of Her Majesty's subjects, and being, therefore, an act of public duty, they can not be held responsible to the laws and tribunals of any foreign country.

Mr. McLeod was under indictment in the State courts of New York, the supreme court of which declined to release him from their jurisdiction, notwithstanding the desire of the General Government. He was therefore put upon his trial, but the failure of the jury to convict him on the evidence put a practical termination to the matter. But to prevent the recurrence of such controversies in the future, by which the act of one of the States might jeopardize the foreign relations of the Federal Government, an act was passed by Congress providing for bringing such cases by writ of habeas corpus under the cognizance of the courts of the United States at the inception of the proceedings. Besides the justification shown in the way of self-defense, the British Government admitted that an apology for the violation of the territory should have been made at that time.

The seizure of St. Marks, Fla., and Amelia Island in 1815 and 1817, respectively, by the United States was claimed in the same way as a necessity, a justifiable invasion of foreign territory to subdue an expected assailant.

The seizure by Spain of the steamer *Virginius*, carrying the American flag, upon the high seas, in 1873, has been justified in the same way by several high authorities, Professor Woolsey, Mr. R. H. Dana, and Mr. George Ticknor Curtis being among the number. Mr. Curtis, in discussing the matter, said:

We rest the seizure of this vessel on the great right of self-defense, which, springing from the law of nature, is as thoroughly incorporated into the laws of nations as any right can be.

The Attorney-General of the United States, however, took the following ground:

Spain no doubt has a right to capture a vessel, with an American register and carrying the American flag, found in her own waters assisting or endeavoring to assist the insurrection in Cuba; but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion.

Even assuming that the vessel was lawfully seized, there was no justification for the summary execution of foreigners by order of a court-martial; and both the United States and England demanded

reparation in behalf of those persons of their respective nationalities who had been executed by the captors of the *Virginius*. This reparation Spain eventually had to make.

Section 22.—Responsibility of a State for Mob Violence.

The weight of modern opinion seems to favor the placing of foreigners, in cases of losses or damage by mob violence, upon the same footing as the citizens or subjects of the State.

Bluntschli says upon this point that States are not obliged to accord indemnity for losses experienced by foreigners as the result of internal troubles or civil war.

Hall takes even stronger ground, and says:

> When a Government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control. When strangers enter a State, they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the Government can have no control; and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a State is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects * * * and because the highest interests of the State itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility toward a foreign State.

Calvo, whose experience as a Latin-American leads him to discuss this question in detail and with much knowledge of current practice, concludes as follows:

> (1) That the principle of indemnity and of diplomatic intervention in favor of foreigners on account of loss resulting from civil or internal war has not been admitted by any nation of Europe or America.
>
> (2) That Governments of powerful nations who exercise or impose this pretended right at the expense of States relatively feeble commit an abuse of power and of strength which nothing known justifies and which is as contrary to their own legislation as is it to international usage and to public propriety.

Several cases have occurred with respect to the question of mob violence in and concerning the United States, two of them having New Orleans as the place of occurrence.

In 1851, after the news had been received of the shooting in Cuba of a number of Americans who had accompanied the Lopez filibustering expedition, riots broke out in New Orleans and Key West against the Spanish residents and consulates. Much injury was done to persons and property. For this Spain demanded reparation. The State Department ruled at that time that the Spanish residents were entitled to such protection only as our citizens were afforded, and that the United States or the State courts were open to them for prosecution for injuries. It was held, however, that the case of the consul was different, and that a just indemnity was due him. Congress voted an indemnity, but did not limit it to the consul.

In 1891, at New Orleans again, a mob, composed of citizens of standing, assembled at the jail and shot or hung a number of Italians who had been arrested for complicity in the assassination of the chief of police of the city. Among these were some persons who were subjects of the King of Italy. The President of the United States, by the Secretary of State, expressed regret at the occurrence, and announced that

he proposed to ask for an indemnity from Congress for the families of the murdered men. The Italian Government was not satisfied with this position, but demanded further that the leaders of the mob be criminally prosecuted and punished according to law. With this demand the Government of the United States could not comply, however willing it might be to do so. The matter was entirely within the jurisdiction of the State courts; it was impossible to institute suit in the Federal courts.

In regard to the merits of the case, it would seem that the United States should accept the responsibility, as in fact they have done, for the acts of the mob. The persons killed were, in the first place, in the custody of the State government, and hence for the purposes of international law, in that of the National Government, and therefore entitled to special protection. In the second place, there was no serious attempt on the part of the local authorities to quell the riot.

The Italian Government eventually withdrew the demand for the punishment of the actors in the affair and accepted a money indemnity instead.

In the case of the massacre of Chinamen at Rock Springs, in Wyoming, in 1885, both the President and the Secretary of State announced most positively, in the words of the latter:

> I should fail in my duty as representing the well-founded principles upon which rests the relation of this Government to its citizens, as well as to those who are not its citizens, and yet are permitted to come and go freely within its jurisdiction, did I not deny emphatically all liability to indemnify individuals, of whatever race or country, for loss growing out of violations of our public law, and declare with equal emphasis that just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government.

If, however, it is manifest that a riot could have been suppressed by means within its control, then, as our State Department claimed in 1878, "a government is liable internationally for damages done to alien residents by a mob which by due vigilance it could have repressed."

Chapter III.

Jurisdiction on the High Seas.

Section 23.—Jurisdiction of a State over its Persons and Property on the High Seas.

A State has jurisdiction over its property and citizens on the high seas when out of the territorial limits of any other State, and when carried under its own flag. This jurisdiction is exclusive in time of peace with the general exception of cases of piracy or for some international offense made so by general or special compact, such as the slave trade. There are still other exceptional cases, such as exterritorial acts done in a great and sudden emergency, by order of the State for purposes of self-defense and self-preservation (referred to in the last chapter) and the chase and seizure of a vessel beyond the marine-league limit, for violation of a foreign municipal law. This latter case is presumed to be done or allowed by the express or tacit consent of the State affected and not as a settled rule of international law.

Whether such jurisdiction is founded upon the theory that ships are floating portions and prolongations of the territory of the State whose flag they carry, or whether it is based upon the theory that the jurisdiction arises in virtue of its control over vessels as its property where no local jurisdiction exists, does not matter; the right exists as a fact, and has been held by no nation with greater persistency than by the United States.

With respect to ships of war and other public commissioned vessels belonging to the State there is little dispute. As Hall says:

> These vessels represent the sovereignty and indendence of their States more fully than anything else can represent it on the ocean: they can only be met by their equals there; and equals can not exercise jurisdiction over equals. The jurisdiction of their own State over them is exclusive under all circumstances, and any act of interference with them on the part of a foreign State is an act of war.

The jurisdiction of a sovereign State over its public vessels upon the high seas is absolute and does not permit the right of search or examination in peace or war. The reasons are self-evident and are inherent with the qualities of sovereignty and equality of an independent State.

Section 24.—Jurisdiction over Merchant Vessels on the High Seas.

Merchant vessels on the high seas are also under the jurisdiction of the country whose flag they fly. This applies to foreigners, seamen, or passengers who happen to be on board as well as to the citizens or subjects of the State whose flag covers the vessel.

In time of peace vessels of war have no right under international law to visit and search or take possession of merchant ships of other States than their own in the ordinary and lawful pursuit of commerce. The exception in the case of suspicions arising that the vessel is piratical is one in which great care is to be observed, for if it happens that

the suspicions were unfounded the captor is liable to heavy damages. One of the best enunciations of the doctrine that each State has exclusive jurisdiction over all persons on board of its merchant vessels is given in a communication from our State Department in 1879, in which it is stated:

> No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas the competent tribunals of the vessels' nation have exclusive jurisdiction of the questions of trial and punishment of any person thus accused of the commission of a crime against its municipal laws; the nationality of the accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nation against whose municipal law he offends.

The effect of this jurisdiction is at times to change the character of a continuing act from a lawful one in foreign waters to an offense against its own country when the vessel reaches simultaneously the high seas and the civil and criminal jurisdiction of its own State. The transportation of persons or of property of certain descriptions may be lawful commerce within the foreign jurisdiction, but may be forbidden by the laws of the State to which the ship belongs.*

In case of collisions occurring on the high seas between two vessels of different but foreign nationalities, the Supreme Court of the United States has decided that admiralty courts of the United States may take jurisdiction. Judge Deady, of the United States district court of Oregon, in rendering a decision as to a case of this kind, said:

> The parties can not be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the jus gentium is any court of admiralty within the reach of whose process they may both be found.†

A case has occurred where a collision having taken place between a British vessel of war and a merchant ship, the former has allowed a trial to be carried on by a foreign court of admiralty; not, however, in submission to the jurisdiction of the court, but for the purpose of having the facts of the case established and the damages judicially assessed.

Section 25.—Determination of the National Character of Vessels.

Public ships of the State consist of vessels of war, dispatch vessels, transports, storeships of various kinds, tenders, revenue-marine vessels, surveying vessels, and other vessels temporarily or permanently employed in service for public purposes only. It is necessary that such vessels should be given a public character by the law of the State or by being commanded by an officer holding such warrant or commission as would render the vessel a public one under such law.

A vessel of war is distinguished from other vessels by her external appearance and by the flag and pennant which are carried. As a rule the pennant is not carried by other than vessels of war or vessels in the service of the National Government. The armament of a vessel and the military character of her crew also may be considered as external signs of her employment.

The nationality of a vessel of war upon the high seas is generally

*See Regina *v.* Lesley, Snow's Cases, p. 187.
†See Snow's Cases, pp. 192–193.

determined by the display of her colors and pennant and, if necessary, also by the firing of a gun, which the French call a coup d'assurance.

If, notwithstanding these evidences, a doubt is entertained as to the vessel being properly a public vessel or ship of war, the statement of the commander, on his word of honor, that the vessel is of that character, is customarily accepted as a matter of courtesy. The commission from the State under which the commanding officer serves must, however, be received as conclusive and as a bar to all further inquiry.

Judge Story, of the Supreme Court of the United States, says as to this in the case of the *Santissima Trinidad:*

> The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. * * * This has been the settled practice between nations; and it is a rule founded on public convenience and policy, and can not be broken in upon without endangering the peace and repose as well of neutral as of belligerent sovereigns.

Merchant vessels and vessels belonging to private owners to be entitled to carry the flag of their country must satisfy such conditions as may be imposed by the laws of their State with reference to construction, ownership, and the nationality and composition of officers and crew.

The display of the flag of a State by a merchant or private vessel is a prima facie evidence of her nationality. Legal evidence is found in the papers she carries, which are issued only where the laws of the State are complied with. In a number of countries the national flag of the mercantile marine differs from the national flag carried by the vessels of war. In the United States the flag is the same for both services, but yachts carry a flag prescribed by the Secretary of the Navy, which is an American ensign with a white foul anchor in the field surrounded by thirteen white stars in a circle.

As a matter of common usage and courtesy, in sighting each other, vessels of all kinds make known their nationality upon the high seas by a mutual display or exchange of colors.

The papers necessary to determine the nationality of a merchant vessel and the nature of the voyage vary in different States, but in general terms they may be said to consist, for vessels engaged in foreign trade, of (1) the register, (2) the crew list, (3) the log book, (4) the bill of health, (5) the charter party, (6) invoices of cargo, (7) bills of lading.

In regard to the national character of vessels Wheaton says:

> The character of ships depends on the national character of the owner, as ascertained by his domicil: but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country, for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them.

To be a private or merchant vessel of the United States it is necessary that the vessel should be duly registered according to law, except those that are duly qualified by law by an enrollment and license, or license only, for the coasting trade, fisheries, or purposes of pleasure. They shall be entitled to the benefits and privileges appertaining to such vessels only when wholly owned and officered by citizens of the United States. All vessels engaged in foreign trade must be registered, except those plying upon the lakes of our northern frontier.

A vessel of less than 5 tons can engage in domestic trade or the fisheries without a marine document and be free from the penalties otherwise prescribed. But she must be qualified in other respects.

There are seven classes of vessels entitled to papers or documents as vessels of the United States:

(1) Such as are built in the United States for citizens of the United States and remain in continuous, exclusive ownership of citizens of the United States.

(2) Vessels built in the United States under foreign ownership, in whole or in part, and recorded as such, upon their becoming the property of citizens of the United States exclusively.

(3) Vessels captured in war by citizens of the United States, lawfully condemned as prize, and owned wholly by citizens of the United States.

(4) Vessels adjudged to be forfeited for a breach of the laws of the United States and purchased and owned wholly by citizens of the United States.

(5) Vessels under a foreign flag wrecked in the United States and purchased and repaired by a citizen of the United States, if the repairs are equal to three-fourths of the cost of the vessel when so repaired.

(6) Vessels of the United States Government sold to a citizen of the United States.

(7) Steamboats for employment only in a river or bay of the United States owned wholly or in part by an alien resident within the United States.

In addition to these classes there are certain foreign-built vessels which have been granted registers as vessels of the United States, with all rights as such, by name in special acts of Congress.

There are seven classes of vessels that are not entitled to documents as vessels of the United States, as follows:

(1) Vessels built in a foreign country.

(2) Vessels built in the United States under foreign ownership, in whole or in part, and not recorded as such; or vessels sold, in whole or in part, to citizens of other countries after having been documented as vessels of the United States.

(3) Vessels which have not been continuously in command of a citizen of the United States.

(4) Vessels owned, in whole or in part, by citizens who usually reside abroad, during the continuance of such residence, unless they are consuls of the United States, or agents for or partners in some trading house consisting of the citizens of the United States, actually carrying on trade with the United States.

(5) Vessels owned, in whole or in part, by naturalized citizens residing for more than one year in the country of their origin, or for more than two years in any foreign country, unless they be consuls or other public agents of the United States. But such a vessel may be documented anew upon sale in good faith to a resident citizen of the United States.

(6) Vessels which were authorized to sail under a foreign flag and to have the protection of any foreign government during the rebellion.

(7) Vessels of the United States seized or captured and condemned under the authority of any foreign power, even after again becoming the property of citizens of the United States, unless such citizens shall have been the owners at the time of seizure or capture, or shall be the executors or administrators of such owners, and shall have regained the ownership of such vessel by purchase or otherwise.

Sea letters and passports for vessels of the United States have fallen into disuse, and the statutes of the United States referring to them are of doubtful effect. Although no vessel is a vessel of the United States unless she be documented as such, both the Treasury and the State Departments concur in permitting the use of the flag of the United States by undocumented vessels owned wholly by American citizens.

The United States Consular Regulations for 1888 read as follows upon this subject:

ART. 317. The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it should be used only by regularly documented vessels. No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts.

ART. 318. It should be understood, however, that such foreign-built vessels not registered, enrolled, or licensed under the laws of the United States, although wholly owned by citizens thereof, can not legally import goods, wares, or merchandise from foreign ports, and are subjected in the coasting trade to disabilities and exactions from which documented vessels of the United States are exempt.

The papers carried by such vessels consist of the bill of sale, accompanied by a certificate from the United States consul or collector of customs at whose office the bill of sale was recorded.

A merchant vessel of the United States engaged in trading on a lawful voyage is allowed to carry cannon and small arms for protection and defense against lawless or partially civilized communities or piratical crews, and she may resist attacks from pirates or any armed vessel which is not a public armed vessel of a friendly nation to the United States.

A list of papers required to be carried by vessels of the United States and of other nationalities will be found in the appendix.

SECTION 26.—MUNICIPAL SEIZURE BEYOND THE 3-MILE LIMIT.

The British "hovering act" passed in 1736 assumed for certain revenue purposes a jurisdiction of 4 leagues from the coasts by prohibiting foreign goods to be transshipped within that distance without payment of duties. This act has been repealed, but a similar provision still exists in the revenue laws of the United States.

Dana, in his note to Wheaton, says upon this point:

The statute does not authorize a seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel coming into an American port and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States may be confiscated, but that to complete the forfeiture it is essential that the vessel shall be bound to and shall come within the territory of the United States after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction.

When a merchant vessel, or some person on board, commits an offense against the laws of a foreign territory while within that territory, the vessel may be pursued outside of the 3-mile limit and there seized. This can only be done when the chase is commenced while the vessel is within the 3-mile limit or has just escaped beyond it. This extended pursuit is considered as necessary to the efficient execution of the laws of the State.

This usage rests rather upon common consent than upon any well-established principle of international law. In fact it is in contraven-

tion to the general limitation of the rule of territorial jurisdiction over waters to the 3-mile limit. If a vessel escapes the pursuing vessel she can not be taken at any other time upon the high seas by vessels of the State whose municipal or revenue law has been violated.

The pursuit of the *Itata* may be held not in accord with the latter statement, but the case of the *Itata*, mentioned later on, can not be considered in its various aspects a useful or binding precedent.

Among the rules upon the subject of territorial waters recently accepted and proposed by the Institute of International Law, at a meeting in Paris in March, 1894, was one declaring that in case of an offense committed within the jurisdiction of a territorial power it might continue a pursuit upon the high seas commenced in its waters; but the right to follow and capture a vessel was to cease upon the pursued vessel gaining a port of a third power or one of its own country.

Section 27.—Piracy and Slave Trade.

Definition and character of piracy.—At the present day piracy is nearly extinct; but in former days it was common in every sea.

Nearly the last remnants of the old kind of pirates in civilized regions were the buccaneers of the Gulf of Mexico and the Spanish Main. In certain Asiatic waters they still exist to a limited extent.

In a charge to a grand jury in 1668 Sir Leoline Jenkins, an English judge, said:

> You are to inquire of all pirates and sea rovers. They are, in the eye of the law, hostes humani generis—enemies of all mankind. They are outlawed, as I may say, by the laws of all nations: that is, out of the protection of all princes and all laws whatsoever. Everybody is commissioned and is to be armed against them, as against rebels and traitors, to subdue and root them out.
>
> That which is called robbing upon the highway, the same being done upon the water is called piracy.

Judge Story, in delivering the opinion of the Supreme Court of the United States, in 1820, said:

> All writers concur in holding that robbery or forcible depredation upon the sea—animo furandi—is piracy. Pirates are freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government.

A pirate, then, is a highway robber of the sea; but as the sea is the highway of all nations, all nations are concerned and are in duty bound to put a stop to his depredations.

There is practically no difference between the definition of the English courts in 1668 and that of the Supreme Court of the United States in 1820. This definition is of piracy by the law of nations, or, as the Latin phrase goes, jure gentium, and it must be carefully distinguished from piracy by municipal law.

A State may by legislation declare any act it pleases piracy, but that does not constitute it piracy by the law of nations. Thus England, by an act of Parliament, and the United States, by an act of Congress, have declared the slave trade to be piracy; and the United States in addition have affixed the same character to certain other criminal offenses when committed on board of our merchant vessels. But in these cases other nations are not in any way concerned or bound, and have no jurisdiction over the offenders.

The true pirate has disappeared from the seas of Europe and America, and therefore the courts have had, practically speaking, no cases of this kind before them for many years.

Insurgents as pirates.—A part of the definition of piracy applies to insurgents if found upon the seas; they have neither the commission nor the flag of any recognized government; and it may be asked, By what right are their ships of war upon the high seas? It is agreed that they have not the rights of belligerents. On the other hand, an important part of the definition of piracy does not apply to them; they are not depredating upon the ships of all nations indiscriminately; their aim is not private plunder or gain; indeed, their motives may be patriotic and morally praiseworthy, while their acts are directed against but one nation, and are for political, not mercenary ends.

Should insurgents then be classed with highway robbers?

It is not necessary, in answer, to assume that insurgents are always right; that is not a question for third parties to determine; it is the duty of the State concerned alone to keep order within its jurisdiction if it wishes to be regarded as a sovereign State in the eye of international law.

Yet there is a considerable amount of legal authority in favor of the opinion that such insurgents may be treated as pirates, jure gentium. The lawful government usually tries to impress this character upon its rebels. Claims of this nature were made by Great Britain during our Revolutionary war, by the Federal Government during the civil war of 1861–1865, and by the Government of Spain during the insurrection in that country of 1873. One of the most noted cases of late days of this kind in our own courts was that of the *Ambrose Light*. The *Ambrose Light* was a brigantine captured in 1885 by the U. S. S. *Alliance* in the Caribbean Sea, about 20 miles to the westward of Cartagena. The *Alliance* was looking for the insurgent *Prestan*, by whose orders Colon had been burned, to the great loss of American citizens. The brigantine carried a strange flag, but, before coming to, displayed a Colombian flag; her papers purported to commission her as a Colombian man-of-war and were from the insurgent leaders at Barranquilla, in Colombia. Believing her commission to be irregular and that she had no lawful authority to cruise as a man-of-war on the high seas, the commanding officer of the *Alliance* took possession of her and brought her to Admiral Jouett, at the time in command of the naval force of the United States in those waters. By Admiral Jouett she was sent to New York for adjudication as a prize. It was found at the trial that she legally belonged to one of the chief military leaders of the insurrection against the Colombian Government, that no one of her officers or crew was a citizen of the United States, and that she was engaged upon a hostile expedition against Cartagena, in Colombia, and was designed to assist in the blockade and siege of that port by the insurgents. The proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the Government of Colombia and to the so-called blockade and siege of Cartagena.

With respect to any recognition of the insurgents by foreign powers, the evidence did not show that up to the time of the seizure of the vessel on April 1, 1885, a state of war had been recognized as existing, or that the insurgents had ever been recognized as a de facto government, or as having belligerent rights, either by the Colombian Government, by our own Government, or by any other nation. The claimants, however, introduced in evidence a diplomatic note from our Secretary of State to the Colombian minister, dated April 24, 1885, which it was contended amounted to a recognition, by implication, of

a state of war. The Government of the United States claimed the forfeiture of the ship as piratical, under the laws of nations, because she was not sailing under the authority of any acknowledged power. The claimants contended that being actually belligerent she was in no event piratical by the law of nations; but if so, that the subsequent recognition of belligerency by our Government by implication entitled her to a release.

Judge Brown, of the United States district court for the southern district of New York, gave an opinion which included the following statement:

> This great weight of authority, drawn from every source that authoritatively makes up the law of nations, seems to me fully to warrant the conclusion that the public vessels of war of all nations, for the preservation of the peace and order of the seas and the security of their own commerce, have the right to seize as piratical all vessels carrying on, or threatening to carry on, unlawful private warfare to their injury; and that privateers, or vessels of war, sent out to blockade ports, under the commission of insurgents, unrecognized by the government of any sovereign power, are of that character, and derive no protection from such void commissions.
>
> In the absence of any recognition of these insurgents as belligerents, I therefore hold the *Ambrose Light* to have been lawfully seized, as bound upon an expedition technically piratical.

On the ground, however, that the Secretary of State, by his note to the Colombian minister April 24, 1885, had recognized by implication a state of war, the vessel was released.

This judgment in the case of the *Ambrose Light* has called forth much adverse criticism, and, on the whole, the weight of opinion would seem to be against the position taken by Judge Brown, that insurgent vessels not molesting the ships of other nations may be treated as pirates.

Mr. Francis Wharton, in the digest of international law, makes a long criticism upon this case. His conclusion as to insurgents is:

> We ought not in any case to interfere to suppress insurrections in foreign States by attacking either the land or maritime forces of the insurgents. * * * No matter how vehement may be the decrees of foreign governments declaring insurgents to be traitors and pirates, those decrees it should not be for us to execute.

In 1869 Secretary Fish, in a communication to Mr. Bassett, then the minister of the United States to Haiti, in relation to some insurgent vessels, wrote:

> We may or may not at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy jure belli.

In 1883 Secretary Frelinghuysen wrote:

> While it (an insurgent vessel) may be outlawed so far as the outlawing State is concerned, no foreign State is bound to respect or execute such outlawry to the extent of treating the vessel as a public enemy of mankind. Treason is not piracy, and the attitude of foreign governments toward the offender may be negative merely so far as demanded by a proper observance of the principle of neutrality.

Secretary Bayard, in 1885, wrote:

> The Government of the United States can not regard as piratical vessels manned by parties in arms against the United States of Colombia when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. * * * There can be no question

that such vessels, when engaged as above stated, are not, by the law of nations, pirates, nor can they be regarded as pirates by the United States.

In 1873 the insurgents at Cartagena, Spain, seized the ironclads of the National Government in that harbor, and cruised with them along the coast of Spain with hostile purpose. The Spanish Government proclaimed them pirates, inviting their capture by any naval power. A German naval commander captured one of the vessels and claimed her as a German prize. His act, however, was disavowed by the German Government, and the Governments of Germany, France, and Great Britain issued practically similar instructions to their naval officers not to interfere in any way with these vessels unless they should molest the merchant vessels of these countries, respectively, and then to seize them and turn them over to the Spanish Government.

The case of the insurgents in the late Brazilian insurrection was much similar to the case just mentioned. The case of the *Huascar* was different. The crew of the Peruvian ironclad *Huascar*, anchored at Callao, revolted on May 6, 1877, and declared for the insurgent government of Pierola, proceeding to sea without opposition from the other Peruvian vessels in the harbor. The titular Government of Peru issued a decree calling the crew of the *Huascar* rebels and authorizing her capture, and stating that the Peruvian Government would not be responsible for her acts. The *Huascar* stopped several British vessels, taking out of one of them two officers who were going to Peru, and also seized certain lighters of coal belonging to British subjects. The British admiral, being advised of these proceedings, sent two vessels of his force to sea to seize the *Huascar*. An engagement took place which was only partially successful, the *Huascar* escaping and subsequently surrendering to the Peruvian Government. The Peruvian Government claimed indemnity from Great Britain, but the law officers of the Crown, upon the question being referred to them, held that as the *Huascar* was sailing under no national flag, and was an irresponsible depredating cruiser, the conduct of the admiral should be sustained. This was a case where hostile acts of insurgents were extended to the ships and citizens of third States.

As the established usage and the rules of international law are made by the accumulation of acts, instructions, and decisions, it will be of value and interest here to quote the instructions given to the officers of the British navy. The British Admiralty instructions, in article 450, read as follows:

> Should any armed vessel not having a commission of war or letter of marque from a foreign de facto government commit piratical acts and outrages against the vessels and goods of Her Majesty's subjects, or of the subjects of any other foreign power in amity with Her Majesty, and should credible information be received thereof, such armed vessel is to be seized and detained by any of Her Majesty's ships falling in with her, and sent to the nearest British port where there is a court of competent jurisdiction for the trial of offenses committed on the high seas, together with the necessary witnesses to prove the act or acts, and with her master and crew in safe custody, in order that they may be dealt with according to law. In the case, however, of an attack by a ship in the possession of insurgents against their own domestic government, upon ships of war of that government, upon merchant ships belonging to its subjects, or upon its cities, forts, or people within the territoral limits of their own nation, Her Majesty's ships have no right to interfere except in the case mentioned in article 447, and in any such case the operations must be restricted to such acts as may be necessary to attain the precise object in view.

Article 447 refers to the offering of asylum and protection to British subjects afloat and ashore, and is given hereafter.

The general aspects of this question and the grounds of its solution are so well stated by Hall that we may fitly quote his words as a conclusion of the discussion. He says:

Most acts which become piratical through being done without due authority are acts of war when done under the authority of a State; and as societies to which belligerent rights have been granted have equal rights with permanently established States for the purposes of war, it need scarcely be said that all such acts authorized by them are done under due authority. Whether the same can be said of acts done under the authority of politically organized societies which are not yet recognized as belligerent may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind. At first sight, consequently, acts of war done under their authority must seem to be at least technically piratical; but it is by the performance of such acts that independence is established and its existence proved. When done with a certain amount of success they justify the concession of belligerent privileges; when so done as to show that independence will be permanent they compel recognition as a State. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question.

Slave trade is not piracy by the law of nations.—The slave trade, though forbidden by the municipal law of all civilized nations and also declared by the municipal laws of Great Britain and the United States, as well as some other nations, to be piracy, is not such by the law of nations. The right of visitation and search of foreign vessels and their capture as slavers in time of peace exists only by special convention or treaty.

A French vessel, *Le Louis*, captured on the high seas in 1816, was carried to Sierra Leone and there condemned. The case was brought by appeal before Sir William Scott, who decided that the slave trade was not piracy according to international law. This learned judge held:

In truth it wants some of the distinguishing features of that offense. It is not the act of freebooters, enemies of the human race, renouncing every country and ravaging every country in its coasts and vessels indiscriminately and thereby creating an universal terror and alarm, but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others.

Woolsey says:

However much the slave trade may deserve to be ranked with piracy or ranked as a worse crime, still it is not yet such by the law of nations, and would not be if all the nations in Christendom constituted it piracy by their municipal codes, for the agreement of different States in the definitions and penalties of crimes by no means gives to any one of them the right to execute the laws of another.

The statesmen and jurists of the United States have always contended that the slave trade is not piracy jure gentium, and have agreed that as no nation can exercise police jurisdiction over private vessels of other nations on the high seas, except in war or for piracy, the right to detain and search vessels on the high seas does not exist as a means for the suppression of the slave trade. The reciprocal right of search within certain limits exists between the United States and Great Britain by the treaty of 1862. By this treaty this right shall be exercised reciprocally only within the distance of 200 miles from the coast of Africa and to the southward of the thirty-second parallel of north latitude and within 30 leagues from the coast of the Island of Cuba. Mixed courts of justice were to adjudicate cases, and were to reside,

one at Sierra Leone, one at the Cape of Good Hope, and one at New York.

By an additional article the right of search was extended to within 30 leagues of the islands of Madagascar, Porto Rico, and Santo Domingo, and by an additional convention in 1870 the mixed courts were discontinued and the jurisdiction transferred to the respective courts of the two countries.

In the general act for the repression of the African slave trade, concluded and signed July 2, 1890, by plenipotentiaries of the United States, Germany, Austria-Hungary, Belgium, Denmark, Spain, the Kongo Free State, France, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Sweden and Norway, the Ottoman Empire, and Zanzibar, the signatory powers agreed to restrict the clauses of special conventions for the suppression of the slave trade concerning the reciprocal right of visit, of search, and of seizure of vessels at sea to a maritime zone in which the slave trade still existed.

This zone extends, on the one hand, between the coasts of the Indian Ocean (those of the Persian Gulf and of the Red Sea included), from Baluchistan to Cape Tangalane (Quilimane); and on the other hand, a conventional line which first follows the meridian from Tangalane till it intersects the twenty-sixth degree of south latitude; it is then merged in this parallel, then passes round the island of Madagascar by the east, keeping 20 miles off the east and north shore till it intersects the meridian at Cape Ambre. From this point the limit of the zone is determined by an oblique line, which extends to the coast of Baluchistan, passing 20 miles of Cape Ras-el-Had.

The signatory powers also agreed in the same act to limit the above-mentioned rights (of search, seizure, etc.) to vessels whose tonnage is less than 500 tons.

Chapter IV.

Intervention; Nationality; International Agents of a State; International Functions of Naval Officers.

Section 28.—Intervention.

The question of intervention by one State in the internal affairs of another State is given considerable space in the older works on international law, the grounds upon which this may be done being elaborately discussed.

At one time the matter of intervention was taken up so seriously as to result in the formation of "the Holy Alliance," a combination of several European States which agreed upon a policy to suppress all insurrectionary movements of peoples against their sovereigns. It was against this principle that the Monroe doctrine was promulgated in 1823.

A State must be allowed, Hall says, to work out its internal changes in its own fashion, so long as its struggles do not actually degenerate into internecine war. In such case, the whole body of civilized States might concur in authorizing intervention. But when it is not authorized by the civilized States, accustomed to act together for a common purpose, such intervention, whether armed or diplomatic, undertaken for the purpose of cruelty or oppression, or on account of the horrors of internal war, would have to be justified by the unquestionably extraordinary character of the facts causing the intervention, by the evident purity of the motives and conduct of the intervening State, and would have to rely for its ultimate justification upon the general judgment as to the sufficiency of the facts. In cases of this kind, intervention being for other purposes than self-preservation can not be considered as a right under the law of nations.

After all, the question of intervention or nonintervention, except for self-preservation as mentioned above, is a matter of national policy rather than that of international law, and carries with it a direct responsibility upon the nation concerned. In Chapter III of the Digest of the Historical Procedure of the United States with respect to matters of International Law, edited by Dr. Francis Wharton, our attitude in past years upon the question of intervention is given in full.

As a late statement upon this subject by a writer of excellent repute of the English school, it may be well to quote the following paragraph from a chapter upon the subject by Mr. Thomas J. Lawrence. He says:

> So prone are powerful States to interfere in the affairs of others, and so great are the evils of interference, that a doctrine of absolute nonintervention has been put forth as a protest against incessant meddling. If this doctrine means that a State should do nothing but mind its own concerns and never take an interest in the affairs of other States, it is fatal to the idea of a family of nations. If, on the other hand, it means that a State should take an interest in international

affairs, and express approval or disapproval of the conduct of its neighbors, but never go beyond moral suasion in its interference, it is foolish. To scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the surest way to get them treated with angry contempt. Neither selfish isolation nor undignified remonstrance is the proper attitude for honorable and self-respecting States. They should intervene very sparingly, and only on the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voice must be attended to and their wishes carried out.

SECTION 29.—NATIONALITY.

The questions: Who are citizens, on what conditions are persons admitted to citizenship, and on what conditions may citizens expatriate themselves, are questions of constitutional law which every State determines for itself. The conflict, however, of the laws of the several States upon these subjects has brought about some of the most difficult problems of international law.

The persons who are subject to the jurisdiction of a State within its territory may be divided into four classes, with somewhat varying rights and obligations. They are—

(1) Native-born citizens or subjects;
(2) Naturalized citizens or subjects;
(3) Domiciled aliens; and
(4) Aliens who are travelers, or who are otherwise temporarily in the country.

Sir Alexander Cockburn says:

> Nationality, or in other words the status of an individual as a subject or citizen in relation to a particular State, is either natural or acquired; natural when it results from birth; acquired when an individual is accepted as a subject or citizen by a State to which he did not originally belong. Nationality by birth or origin depends according to the law of some nations on the place of birth; according to that of others on the nationality of the parents without reference to the place of birth. In many countries both elements exist, one or the other predominating.

Primarily it is the function of municipal or State law, as before said, to define what constitutes a citizen or subject of a country, but the question of protecting citizens abroad, and of the continuance of certain obligations toward the State on the part of such citizens abroad, bring questions of nationality and citizenship within the scope of international law. The treatment of the subject here is with respect to its connection with the protection of citizens abroad. Naval officers of the United States have placed upon them a separate responsibility or action independent both of the consular and diplomatic officials accredited abroad. Hence sufficient acquaintance with this subject is a matter of importance to them in order that their actions may be based upon sound reason and knowledge.

Concerning native-born citizens of the United States, there can be, generally speaking, no question as to their status, so long as there has been no act upon their part, or upon the part of the State, to otherwise designate their allegiance. To this class may be also added foundlings; their parentage being unknown, there is no other State to which they can be attributed except the one upon whose soil they have been found.

There are, however, certain persons, some also born to the soil, as to whose nationality there may arise doubts.

Following Hall, we can classify them as follows:

1. Children of the subjects of one State born within the territory of another.

2. Illegitimate children.
3. Married women.
4. Persons adopted into a State by naturalization.
5. Persons losing their nationality by emigration.
6. Children of parents in the last two categories.

As to children born abroad, the more important countries of the world agree that the children of a foreigner ought to be considered as foreigners unless they wish to assume or retain the nationality of the State in which they were born. The law of the United States is to the effect that children of foreigners born in the United States are American citizens if they so elect upon attaining majority, while the children of American citizens born abroad are also citizens of the United States, but the rights of citizenship do not descend to children whose fathers never resided in the United States.*

As to illegitimate children, it is the general rule, and for manifest reasons, that they belong to the State of which the mother is a subject or citizen.

The nationality of a wife upon marriage becomes that of her husband. In the United States the rule is held that an alien woman marrying an American citizen becomes an American citizen. The converse has not always, however, been sustained, i. e., that an American woman marrying an alien loses her nationality. Following the English rule, which existed until 1870, the practice for a long time prevailed that the wife retained her American nationality, but the best opinion now holds that an American woman who marries a foreigner becomes a foreigner, though not to the extent of losing her ability to transfer her real property. It is not reasonable to suppose that the United States would claim the right to interfere on behalf of the American wife of a foreigner against the action of her husband's government. As to widows, American born or naturalized, of foreign husbands, the ruling is conflicting, but the best opinion is that they remain of the nationality of their late husband, unless they marry again and to a person of a different nationality.

Section 30.—Naturalization and Expatriation.

Naturalization and expatriation are not inherent rights as recognized by international law. These questions in modern times are settled by individual States in accordance with their own interests or by conventions and treaties with other States. The general tendency of late years is to permit expatriation and naturalization. In 1870 England gave up, by statute, the principle of indelible allegiance; that is, once an Englishman, always an Englishman.

The act of Congress, in 1868, provides that all naturalized citizens of the United States, while in foreign States, shall be entitled to and shall receive from the Government the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

A State has for its own self-preservation or well-being the right to exclude foreigners and to refuse them naturalization. By the act of Congress of May 6, 1882, it is provided that thereafter no State court or court of the United States shall admit Chinese to citizenship.

A declaration of an intention to become a citizen of the United States, strengthened by the acquisition of a domicile, places a person

*Rev. Stat., U. S., sec. 1992–1993.

almost within the grasp of citizenship and affords him a claim to protection abroad, but not to a passport from the Government.

By French law a citizen can lose the quality of a Frenchman by naturalization in a foreign country, but any person so naturalized can be punished by death if he bears arms against France. This latter condition and penalty with respect to bearing arms against one's former country also exists in the laws of Italy.

We have had disputes with nearly all of the continental European States with respect to naturalized American citizens, and this has been more especially the case since military service has become so universal and burdensome in those countries. Young men of the required age often procure American naturalization and then return to their native land and claim the protection to which they are entitled by their American nationality. The United States at first took the ground that no distinction should be made between naturalized and native-born Americans with respect to such protection abroad, but we have found it difficult to sustain this position under all circumstances.

By the terms of the treaty made in 1868 between the United States and the North German Confederation reciprocal naturalization conditions were adopted providing for an uninterrupted residence of five years in the United States for Germans claiming to be naturalized American citizens and five years uninterrupted residence in Germany for Americans claiming to be German subjects. The declaration of an intention to become a citizen is not to have for either State the effect of naturalization.

If, however, a German naturalized in America renews his residence in Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. In practice the German authorities, upon the expiration of the two years' residence, give naturalized Americans an opportunity to return to the United States before forcing them to fulfill service in the German army.

With Turkey there have been various disputes arising from the naturalization of Armenian-Turkish subjects. The Turkish law of 1869 refuses a recognition of the foreign naturalization of an Ottoman subject without the sanction and previous authorization of the Turkish Government. Every individual inhabiting Ottoman territory is reputed to be an Ottoman subject by the same law until his character as a foreigner is verified in a regular manner.

The Russian Government also declines to admit the right of another State to exempt its subjects by naturalization from their unfinished duties to their native land. In case of arrest under such circumstances the Russian Government generally at the request of the United States grants a release, but under conditions, and this is regarded as a concession from courtesy and not from right. We can not force our views concerning this or other matters upon foreign governments when their policy or their laws so strongly conflict with our own.

There is still another matter which has been a source of almost constant dispute with other countries, and that is as to the status of a foreigner who has declared his intention to become a citizen of the United States and who, though having a domicile in this country, is temporarily out of the jurisdiction of the United States. The case of Martin Koszta came under this head. Koszta was a Hungarian insurgent and refugee of 1848–49. Escaping to Turkey, he was there

arrested and imprisoned, but released on condition of leaving the country. He came to the United States and made the usual declaration of intention to become a citizen. In 1853 he returned to Turkey, and when in Smyrna he was seized by some persons in the employ of the Austrian consul and finally taken aboard the Austrian man-of-war *Hussar* for conveyance to Trieste. The United States chargé d'affaires at Constantinople requested the commanding officer of the United States man-of-war *St. Louis* to demand Koszta's release and if necessary to have recourse to force. The *St. Louis* went to Smyrna and Captain Ingraham informed the commander of the *Hussar* that unless Koszta was at once delivered to him he should take him by force of arms.

As a conflict between the two ships of war would have been attended with great danger to the shipping and town, the French consul offered his mediation and Koszta was delivered to his care to be kept until the decision of the respective governments was ascertained. In the end the affair was settled by Austria assenting to Koszta's return to the United States, the right to proceed against him in case he returned to Turkey being reserved. Upon a request for reparation being made on the part of Austria, Secretary Marcy claimed: First, that Koszta had a right to renounce his Austrian allegiance and seek domicile elsewhere; second, that Koszta was not an Austrian subject according to Austrian decree, as he had left Austria without permission, with intention never to return, and hence had lost all real and political rights at home; third, that Koszta, although not naturalized and not a citizen had acquired domicile in the United States, declaring his intention to become a citizen, and hence he was entitled to the protection due, and to be treated as, an American citizen. Mr. Marcy also claimed that it was a maxim of international law that domicile confers a national character. This position of Mr. Marcy, though questioned by Hall, is sustained by Calvo. By the instructions of the Department of State issued by Secretary Bayard in 1885, it is provided:

> Nothing herein contained is to be construed as in any way abridging the right of persons domiciled in the United States, but not naturalized therein, to maintain internationally their status of domicile and to claim protection from this Government in the maintenance of such status.

In regard to the case of Simon Tousig, a native of Austria, who had acquired domicile in the United States, but not citizenship, the case was decided differently, upon the ground that Tousig had voluntarily returned to his native State and placed himself within the reach of her municipal laws, one of which he was charged with having offended.

Mr. Marcy decided that, as to his passport he was not entitled to it, not being either a native or naturalized citizen, and, furthermore, having gone by his free act under the jurisdiction of Austria, he had subjected himself to her municipal laws. In this way the case differed from that of Koszta, who was in the jurisdiction of a third State when arrested.

Mr. Marcy goes on to say:

> Every nation, whenever its laws are violated by anyone owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor, if found within its jurisdiction.

When a person has lost one nationality, as it is possible for an Austrian to do, without having gained another elsewhere through want of time or intention, it may be not unwisely ruled that the character of his nationality can be ascertained by his place of domicile.

Aliens are entitled to protection, both as to life and property, in the same manner as citizens. The right to hold title to real estate is dependent upon the laws of the State in which the land is situated. Aliens are not liable, as a rule, to military service, but they can, if allowed, voluntarily enlist.* They can be called upon for service in the militia or local police to maintain social order, provided the duty is a police one and not political, and they can be called upon to take arms against an external enemy, if such enemy threatens the existence of social order, as in the case of an attack by savages or uncivilized peoples.

Aliens are subject to local allegiance whether the Government is duly recognized or is only de facto. They are not exempt from taxation unless they are foreign diplomatic agents.

Aliens may be expelled or excluded from a country if the State should so direct. This right is one of the attributes of a sovereign State. It has been exercised at times by the United States, as in the passage of the alien act of 1798, in the exclusion of foreign paupers and criminals, of foreign contract laborers, and of Chinese immigrants.

Section 31.—Protection of Citizens in Foreign Countries.

Hall says:

> States possess a right of protecting their subjects abroad, which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions; they have the right, that is to say, to exact reparation for maltreatment of their subjects (or citizens) by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain; and they have the right to require that, as between their subjects and other private individuals, the protection of the State and the justice of the courts shall be afforded equally, and that compensation shall be made if the courts, from corruption or prejudice or other like causes, are guilty of serious acts of injustice.

As we have seen, "all persons entering upon a foreign territory" submit themselves to the jurisdiction of that country; but, on the other hand, they are entitled, under the rules of international law, to the same protection that citizens receive, and they must pursue their remedies in the same way through the courts of law. No nation has affirmed this principle more strongly than the United States. The reason for this rule is that to give aliens special privileges would establish an unjustifiable inequality between citizens and aliens, and would conflict with the exclusive territorial jurisdiction of the State, a fundamental right of its existence.

The responsibility of a State results not from the mere fact of injury done to foreigners within its territory, but from its neglect or inability to redress the wrong, to control the conduct of its citizens, or to punish them for offenses which they commit against aliens.

In this last-named case it is the duty of the State whose citizens are injured in a foreign land to interfere in their behalf, and the method of interference will vary in accordance with the character of the State within whose territory the injury complained of takes place.

States, with respect to their character or institutions, may be divided into three general classes: (1) Stable; (2) weak; (3) semicivilized or barbarous.

In the case of States possessing stable institutions and whose courts

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*By an act of Congress of 1863, aliens who had made a declaration of intention to become citizens were made subject to the military draft, but were given time to leave the country if they chose.

are always ready to redress the injuries of individuals, all that is ordinarily done is to call the attention of the Government, through diplomatic channels, to any seeming failure of justice in respect to aliens, and if a dispute follows it is settled diplomatically or by war. Stable governments exist in nearly all the States of Europe, the United States, and perhaps some of the Latin-American States.

There is a peculiarity in the Constitution of the United States which calls for a passing notice, and that is the inability of the Federal Government to control the action of the governments and courts of the several States of the Union in respect to what is called the common-law rights of citizens. The Federal courts have no common-law jurisdiction in criminal cases, whether the question be with regard to citizens or aliens, so that when an alien is killed or criminally assaulted within a State the Federal courts have no jurisdiction to punish the offender; it must be left to the State courts. But the individual States of the Union have no existence as subjects of international law, and can not be reached except through the Federal Government, which is alone responsible toward other countries for the acts of the States in such matters. Thus we have an anomalous condition of things—the Government of the United States responsible to foreign governments for acts over which it has no control. A good illustration of this difficulty was shown at the trouble which arose concerning the assassination of Italians by a mob at New Orleans, which has already been referred to. The indemnity offered by the United States was for the reason that the Italian subjects murdered were in the custody of the State authorities, and, from an international point of view, in the custody of the United States, and hence entitled to special protection, whereas the State and municipal authorities failed to protect them.

The case of the assault upon the seamen of the U. S. S. *Baltimore* made in Valparaiso in 1892 was peculiar. The attack was upon men wearing the uniform of the United States, and in the opinion of our Government the animus of it was directed against the United States rather than against the seamen as individuals; yet it may be questioned whether under international law these circumstances were sufficient to render the Government of Chile responsible for the outbreak.

Vattel says:

> It would be unjust to impute to the nation all the faults of its citizens. In general it can not be said that one has received an injury from a nation because some of its members have injured him.

The vital question of international law involved in the case of the seamen of the *Baltimore* was, however, whether the Chilean Government took proper or sufficient measures to prevent the attack and to bring the offenders to punishment. That was a question of fact which our Government had to decide for itself according to all the evidence in its possession, and it decided that the Government of Chile had not done all that it should have done to prevent the attack and to punish the offenders.

As to the second class of States—that is, weak States, or States whose internal sovereignty is unstable—foreigners must often be protected, not by diplomatic representation—there is often no time for that—but by the immediate employment of the naval forces of their own country.

There can hardly be said to be a fixed rule of international law upon this subject, it being exceptional in its nature, as international law

presumes that all sovereign States are capable of enforcing their laws within their jurisdiction.

In this class of States, whenever civil commotions occur, it is usual for foreign nations to send ships of war to the scene of the disturbance for the protection of the lives and property of their citizens who may be residing there. In places where diplomatic agents are stationed they as a rule have instructions to confer with the senior naval officer as to the advisability of using the naval forces of their nation in critical cases. With respect to the United States, the diplomatic agents have no authority by law or otherwise over the officers of the Navy unless it is especially directed by the President of the United States as Commander in Chief.

Lemoine says:

> In certain urgent cases, under the personal responsibility of the commander of a vessel of war, an intervention may take place in favor of his countrymen who are in imminent danger, and, indeed, such cases are not infrequent in certain places where public authority is not organized as in Europe.

He adds that great care should be taken before intervening on the demand of the persons supposed to be endangered, who are, he thinks, usually inclined to exaggerate the facts.

Under the rules of some States it is customary for the diplomatic representative, when present, to assume the responsibility of deciding when the occasion for intervention arises. But even in this case the senior naval officer is to judge whether the military or naval measures are capable of execution, and he is to be responsible for the carrying out of such measures.

But in the practice of other States, even where they have permanent and trained consular and diplomatic representatives at the scene of the disturbance, there is a tendency to place both the responsibility and the decision as to the use of naval or military measures upon the naval commander alone.

In the French code (art. 138, du décret sur le service à bord) it is directed that the commanding officer shall, as much as possible, act in concert with the diplomatic agents or consular authorities of France; but the commanding officer alone remains the judge of the occasion or necessity for the use of his forces, and he is also the sole judge of the limits in which this action can be exercised.

In the admiralty instructions to British naval officers (art. 438) it is stated:

> It being a general obligation on all Her Majesty's civil and military officers to afford mutual assistance to each other in cases affecting the Queen's service, the commander in chief of a station or the senior officer present at a port is to pay due regard to such requisitions as he may receive from any of Her Majesty's ministers, governors, or consular officers having for their object the protection of her possessions, the benefit of the trade of Her Majesty's subjects, or the general good of her service.

In case such requisitions conflict with his orders he is to decide as in his judgment seems best; but—

> He is always to bear in mind the grave responsibility that would rest on him if the circumstances were not such as to fully warrant the postponement of the instructions from his naval superior to the more pressing requisition from Her Majesty's civil servant.

Article 447 of the same instructions states:

> As a general rule protection to British subjects is to be limited to affording them asylum on board ship and to securing them by boats an escape from the shore when

their departure may be a necessary precaution. Interposition by the landing of an armed force is only to be had recourse to when the lives or property of British subjects are actually in danger from violence which can not be otherwise controlled.

In the Navy Regulations of the United States (arts. 285 and 286) it is provided that on occasions where injury to the United States or their citizens is committed or threatened the commander in chief or senior officer present shall consult with the diplomatic or consular representatives of the United States and take such steps as the gravity of the case demands. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

In no case is force to be used, except as an act of self-preservation, which is defined to include "the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury." Force is never to be exercised with a view to inflicting punishment for acts already committed.

In all cases where measures involving the use of force are once undertaken it can be readily seen that a failure to carry them out leaves matters in a worse condition for all concerned than if they had not been begun.

Very often the mere appearance of a naval force and a firm attitude on the part of the senior officer present will prevent the necessity of resorting to active measures. A display of force is sometimes ordered by Congress, as well as by the Executive.

It happens at times that the commander of a vessel of war is requested to protect the citizens of other States than his own, and in uncivilized or weak communities or upon sudden emergencies this protection may be granted.

Instances of this kind have occurred of late years as in the case of protection afforded by a British man-of-war to the inhabitants of Alaska at the time of a reported Indian uprising, by a British man-of-war again at the time of the shooting of American citizens and British subjects from the *Virginius* at Santiago de Cuba, and also by our own vessels on the Isthmus of Panama, at Samoa, and at Bluefields, in Nicaragua.

A somewhat interesting case of this kind happened in 1877 at Apia, Samoa. In that year American residents and others for some reason revolted against the authority of the American consul at Apia and took possession of the consulate. There being no American man-of-war in the harbor at the time, the French man-of-war *Seiguelay*, commanded by Captain (afterwards Admiral) Aube, was called upon by the American consul for assistance and protection. Captain Aube complied with the request, landed a force, and restored the authority of the consul, and secured to him the possession of the consulate, only requiring from the consul that he, as representative of the United States, should take the absolute responsibility of his acts, and that he would act only against persons submitted to his jurisdiction.

The French admiral in command of the station on which the *Seiguelay* was serving disapproved of the action of its commander, but the French ministry at home sustained Captain Aube and approved his action.

During the negro insurrection on the Danish island of Santa Cruz, in the West Indies, in the same year (1877), the U. S. S. *Plymouth*, under the command of Captain (now Admiral) Harmony, was ordered to that place to protect American interests, and in the interests of humanity to look out for the defenseless white inhabitants of that

island. This protection was afforded in turn by American, English, and French vessels of war, while the governor of the neighboring Spanish colony of Porto Rico held a land force in readiness for embarkation for the same purpose. In this case an armed force was occasionally landed for moral effect from the *Plymouth* by the request of the Danish authorities.

The British admiralty regulations provide for cases of this kind in the following terms:

> Application for the protection of subjects of foreign powers in amity with Her Majesty may be entertained in case none of their ships of war are present; the application should, however, be made through Her Majesty's minister or consul, and it should only be acceded to when the protection does not interfere with the public service nor with the orders under which the naval officer is acting.

Though no regulation of this kind exists for the United States Navy, it can be considered as an established usage to extend similar protection under similar circumstances.

Citizens or subjects of one State merely entering into the military or naval service of a foreign country do not thereby lose their citizenship; but if they engage in warlike measures, or in an attack upon the Government in whose jurisdiction they reside, they forfeit claim to the protection of their own Government.

Pomeroy says:

> A practical difference may exist between the case of a foreigner domiciled in a country of which he is not a citizen and the case of a foreigner temporarily and transiently there. The former person may well be subjected to many claims from the State of his adoption which would be unwarrantable if demanded from the latter: thus, he might well be called upon to pay taxes, to do military service and the like.

The landing of troops for the protection of the transit route across the Isthmus of Panama, which is a duty assumed by the United States under a treaty, would include the protection of all American and other citizens and their property when such persons are concerned directly or indirectly with this transit.

Cases may arise of anarchy, social disorder, or mob rule which would justify a favorable reply to the request of the local authority for the restoration of order. Such a response would be in the interests of good order, civilization, and humanity.

With respect to semicivilized or barbarous countries, even where there is a recognized government, foreigners are by treaty largely exempted from local jurisdiction. In such countries the consuls of foreign States are clothed with extensive powers, and it is customary for ships of war to aid them in the protection of their own citizens, and at times those of other civilized States. Intervention in such countries is not so grave a question in relation to international law, for these countries have not the full rights of sovereign States. Countries under this head would include China, Korea, Siam, Muscat, Persia, Turkey, Morocco, some of the Pacific islands, and until recently Japan.

In these questions of protection to citizens the naval forces have come to be the principal means used of upholding the authority of their respective States, and their aid is constantly called upon. But the diplomatic and consular agents of a State are primarily required to look to the safety and protection of citizens in foreign countries.

It will therefore be not inappropriate to examine at this point the character and functions of these officers.

Section 32.—International Agents of a State.

When a State has an individual head, he is to be considered as a representative, or rather embodiment, of the sovereignty of the State, and he is entitled as a consequence to respectful personal consideration from the other States of the family of nations and from their representatives. As the object of this consideration is to express the respect due to a sovereign State, any intentional omission to comply with the customary and proper observances must be regarded as an insult to the State which it has a right to resent.

The chief agent of a State in its international relations, within its own borders, is the person to whom the management of foreign affairs is committed. This person in the United States is the Secretary who is at the head of the Department of State, and who is known as the Secretary of State.

Subordinate to this agent are other officers or agents, resident in foreign countries, who represent the State in a public capacity and are known as diplomatic and consular officials.

Diplomatic agents.—The political relations of States are carried on abroad usually by diplomatic agents. These agents have been in existence since the beginning of nations, but it is only in modern times that the system of permanent embassies has been established; indeed the system was hardly recognized generally at an earlier date than the peace of Westphalia in 1648. Even after that date resident ambassadors were often looked upon with great disfavor and some sovereigns refused to receive them, regarding them as spies, which they were in many cases.

In the older system of diplomacy ceremony was of much more importance than it is at present. The question of precedence in a congress of nations, or at courts, was of immense international consequence; months were spent in deciding questions of etiquette alone. In the case of the peace of Westphalia the preliminary questions, many of them of a merely ceremonial character, occupied several years. The congress of Berlin, on the other hand, concluded the treaty of 1878 in less than a month from the date of its first meeting.

This question of precedence was so troublesome in the past that the congress of Vienna in 1815 attempted to regulate it by dividing diplomatic agents into three classes, and at the congress of Aix la Chapelle, three years later, an additional class was created. This classification, which has been generally accepted, is as follows:

1. Ambassadors, legates and nuncios of the Pope.
2. Envoys and ministers plenipotentiary.
3. Ministers resident, accredited to the sovereign.
4. Chargés d'affaires.

The first three classes are accredited to the sovereign or head of the State, the last class to the secretary or minister for foreign affairs.

The theory formerly held that an ambassador represented his sovereign personally, and had the right of treating with the foreign sovereign personally, has lost its practical value under modern methods of government, and the classification of diplomatic agents is now of little more than ceremonial value.

There is no absolute obligation to receive diplomatic agents, but the custom is now so deeply rooted in the practice of nations that a refusal would require very grave reasons for its justification, and would be looked upon as so unfriendly an act as to be little removed from hostility.

A State may refuse to receive an ambassador on special grounds; for instance, some Protestant States refuse to receive legates or nuncios of the Pope; a State is not generally willing to receive one of its own citizens as an ambassador of a foreign State; and a person appointed as diplomatic agent may be for various reasons or causes refused as a persona non grata. In some States it is usual to send the name of the proposed appointee to the Government of the State to which he is to be appointed in order that objections, if any exist, may be made before the appointment.

A diplomatic agent may also be dismissed if for any reason he becomes a persona non grata.

It has been held by our Government in the case of Minister Egan, whose recall was demanded by Chile in 1892, that the grounds of objection must be communicated and must be such as to justify the demand. It has been said that the United States have the misfortune to supply almost all of the modern instances in which a government has felt itself unable to continue relations with a minister accredited to it, and it must be admitted that the list of cases is long, beginning with Gênet in 1793 and ending with the present year.

Diplomatic agents are furnished with letters of credence. This instrument is addressed by the sovereign or chief of State to the sovereign or State to which he is sent. In the case of a chargé d'affaires it is addressed by one minister of foreign affairs to another. This letter of credence contains the general purport of the mission, the name and class of the agent, and a request that due faith be given to his representations, etc. He is also furnished with instructions, from which he may not depart; and in the case of new questions arising additional instructions are sent. At rare times he is furnished with "full powers," in which case his State is bound by his acts. The subordinates of an ambassador or minister are generally known as secretaries of embassy, secretaries of legation, naval, military, and other attachés.

Although diplomatic agents do not enter upon the exercise of their functions until their reception takes place, if their passports show their diplomatic character they have all of their rights of immunity with respect to the State to which they are accredited, while on their voyage to it and in case of dismissal or recall until their departure from its limits and jurisdiction.

As a general rule it may be stated that a diplomatic agent does not have special rights or privileges in States to which he is not accredited. As a matter of courtesy these privileges are, however, sometimes extended to ministers en route to or from their posts.

Diplomatic agents, secretly accredited to foreign States, are naturally debarred from the full enjoyment of the privileges and rights of a public agent. So far as the government to which he is accredited is concerned, he is entitled to inviolability so far as their direct action is concerned.

Commissioners for special objects are not considered to be entitled to the immunities of diplomatic officials, but are entitled to special protection and courtesy.

Bearers of official dispatches to and from diplomatic agents are considered to have the same rights of inviolability that belong to the diplomatic officials themselves. They should have special passports, stating their mission.

Consular officials.—The establishment of consulates is of a much earlier date than that of resident embassies. The institution had its

origin during the Crusades, which gradually brought about trade relations between the East and the ports of the western Mediterranean—such as Venice, Genoa, Marseilles, and Barcelona. At this time the States offered little guaranty for the security of life and property, and it behooved the merchants to protect themselves. They not only formed guilds, but it is probable that consuls were first appointed by associations of merchants. But the various States as they emerged from the chaos of feudalism assumed control of the consular system. Consuls at this time enjoyed the full privileges of exterritoriality and the immunities accorded at the present time to ambassadors. These, as stated before, are still retained to a large extent with Oriental nations.

Before the middle of the seventeenth century a great change had been effected in international intercourse and commerce. Sovereign States had taken the place of feudal barons, and the exterritorial jurisdiction of consuls was no longer needed or permitted. Moreover, permanent legations had been established and ambassadors assumed many of the functions formerly belonging to the consuls. As a result, consuls settled into the position of general guardians of the shipping and navigation interests of their respective nations and of their citizens, which is in the main the position they now hold. It has been said that diplomatic agents represent their States and that consuls represent the individuals of the State.

Consuls are not furnished with credentials nor instructions, but with a commission to watch over the commercial rights and privileges of their nations, and before entering upon their duties they must receive a commission called an exequatur from the sovereign of the country to which they are sent, which may be revoked at any time. As a general rule, they are amenable to the civil and criminal jurisdiction of the country in which they reside.

Strictly speaking, consuls have no political or diplomatic matters to deal with, but, as a matter of fact, they have become, by usage, the local representative of the minister accredited to the country. There may be circumstances, for instance, in the absence of the diplomatic agent, which makes it proper for him to address the local government upon subjects which relate to the duties and rights of his office, and which are usually dealt with through a legation.

Consular officers of the United States rank from consular clerk to consuls-general, and in some countries, like Korea and Siam, the minister resident combines the official functions and title of consul-general with that of minister resident.

Consuls, unlike diplomatic agents, may be, and often are, citizens of the country in which they reside, and may be engaged in business there, but the tendency is latterly to restrict them in this respect, so that now consuls-general and consuls of the first grade are not permitted by many States to engage in business.

Sometimes consuls-general are also clothed with diplomatic character, being both consul-general and chargé d'affaires. The United States has fourteen such consuls-general, who are for the most part residents in semicivilized countries. Some European Governments refuse to receive persons clothed with these two characters.

Again, consuls or consuls-general in colonies distant from the mother country are often permitted to make diplomatic representations to the local Government or authorities and to do other things which are usually performed by diplomatic agents. There are a number of cases of this kind, as in Australia, India, and elsewhere.

Consular officials may be accredited, in accordance with the Revised Statutes of the United States, with temporary diplomatic functions by the President.

The ordinary duties of a consul can be embraced under four general heads: First, acts pertaining to vessels, to masters and seamen, or to passengers and emigrants; also acts relating to shipwreck, the apprehension of deserters, and the relief and return of seamen; second, acts relating to goods for export to the country he represents, such as authentication of invoices, granting of debenture certificates, etc.; third, acts in behalf of the government which employs him, including commercial and hydrographic information collected, and reports as to matters of general or special importance occurring within or near his consular district; fourth, acts in behalf of the citizens of the country he represents who are abroad and within his district; these acts include matters relating to deaths, notarial acts, administration of estates, and the charge of the effects of deceased citizens.

The consular service of the United States consists of agents and consuls-general, vice-consuls-general, vice-consuls, deputy consuls, commercial agents, deputy commercial agents, consular agents, consular clerks, interpreters, marshals, and clerks at consulates.

The only agent and consul-general is at Cairo, Egypt. He enjoys a quasi-diplomatic position, so far as the Porte may consent thereto. The title of commercial agent is peculiar to the United States, but commercial agents are full, principal, and permanent consular officers, as distinguished from subordinates and substitutes, and are entitled to all the powers, immunities, and privileges that under public law or otherwise are accorded to the consular officers. Vice-consuls-general, vice-consuls, and vice commercial agents are substitutes who may temporarily fill the places of consuls-general, consuls, and commercial agents. They have no function or powers when the principal officer is present, but their powers are coextensive with those of their principal when they are acting in his place during his absence.

Deputy consuls-general, deputy consuls, and deputy commercial agents are consular officers subordinate to their principals and exercising and performing the duties within the limits of the respective offices at the same ports or places where their principals are located. They perform their functions whether their principal is absent or not; but they do not assume responsible charge of the office, that being the duty of the vice-consular officer.

Consular agents are consular officers, also subordinate to their principals, exercising their powers and performing their duties within the limits of the several consulates, but at ports or places different from those at which the principals are located. They act only as representatives of the principal and are subject and subordinate to him.

Conventions and treaties concerning consular privileges and functions exist between most of the civilized and semicivilized countries of the world and the United States. The parts applying to consuls are to be found in Appendix No. 1 of the Consular Regulations. Great Britain has no consular conventions defining privileges, etc., to any extent on account of the obstacles which her municipal laws place in the way of accomplishing this object.

The Navy Regulations of the United States provide for the visits, honors, and salutes to be accorded the diplomatic and consular officers of the United States and foreign countries. A relative rank is prescribed by the direction of the President of the United States in the

Consular Regulations of 1888, by which agents and consuls-general rank with a commodore in the Navy or brigadier-general in the Army.

Consuls and commercial agents rank with captains of the Navy or colonels of the Army.

Vice-consular officers rank with lieutenants of the Navy or captains of the Army.

The precedence in the same grade will go by date of commission.

In the British service, consular officers have the following rank and precedence as compared with naval officers: Agents and consuls-general rank with but after rear-admirals; consuls-general with but after commodores; consuls with but after captains of the navy of three years' standing; vice-consuls with but after lieutenants of the navy of eight years' standing; consular agents with but after other lieutenants of the navy.

Consular officers of the United States, with those of other Christian countries, enjoy exceptional and exclusive judicial powers in China, Korea, Japan (until the treaty of 1895 shall be in full operation), Siam, Borneo, Madagascar, Muscat, and Morocco. Consular agents are not deemed to be judicial officers within the intent of the statutes of the United States.

In addition to the above countries, consuls and commercial agents of the United States at islands or countries not inhabited by any civilized people or recognized by any treaty with the United States are also invested by law with certain civil and criminal jurisdiction. In some of these countries there are mixed courts provided for certain cases between subjects of the semicivilized powers and American citizens.

The jurisdiction of consular courts is to be exercised in conformity, first, with the laws of the United States; second, with the common law, including equity and admiralty; third, with decrees and regulations having the force of law, made by the ministers of the United States in each country respectively, to supply defects and deficiencies in the laws of the United States or the common law as above defined.

The ministers of the United States accredited to the countries in which exist consular courts have certain supervision and jurisdiction over consular courts. They themselves at times act as judges, and are also judges to whom appeals from consular courts can be taken in certain cases. In cases of sufficient magnitude appeal can be taken from the decisions of the United States consular courts and ministers in China and Japan to the circuit court of the United States for the district of California.

Naval officers as international agents.—Officers of the Navy, both in time of peace and in time of war, are frequently called upon to act as agents of their country, both ashore and afloat. As their functions in this behalf are independent of or concurrent only with those of the diplomatic agents of the United States, they are frequently called upon to act with responsibility in cases of grave importance; and furthermore, as they are the only permanent body of officials of the Government of the United States who act as international agents, it is of importance that they should be well versed in the usage and law of nations.

The Regulations for the United States Navy require explicitly that they should, in their relations with foreign States and with the governments or agents thereof, observe and obey the law of nations

Upon the arrival of men-of-war in foreign ports the salutes, visits,

and other ceremonials toward the port and its authorities are prescribed in full detail by the Naval Regulations, and the honors that are required to be given to the President of the United States and to the civil, military, and naval officials of our country are to be extended in the same degree to foreign rulers and officials.

It is expressly enjoined upon the senior naval officer present to impress upon the officers and men under his command in a foreign port that it is their duty to avoid all causes of offense to the authorities or inhabitants; that due deference must be shown to local laws, customs, ceremonies, and regulations; that in all dealings with foreigners moderation and courtesy should be displayed, and in general a feeling of good will and mutual respect cultivated.

No salute, however, is to be fired in honor of any nation or of any official of any nation not formally recognized by the United States.

All possible assistance in cases of distress is to be afforded by naval officers to vessels of our own and foreign States at peace with the United States. If similar assistance, in time of need, be refused to any vessel of the United States by foreign naval ships or officials, the matter must be reported to the Navy Department.

During war between civilized nations with whom the United States are at peace all naval officers are required to observe the laws of neutrality and to respect lawful blockades; but they are enjoined at the same time to make every possible effort that is consistent with the rules of international law to preserve the lives and property of citizens of the United States wherever situated.

On the high seas, and wherever there is no diplomatic or consular officer of the United States at a foreign port, the senior naval officer is to exercise the powers of a consul in relation to mariners of the United States. He is also to communicate or remonstrate with foreign civil authorities as may be necessary, and to urge upon our citizens the necessity of abstaining from participation in political controversies or violations of the laws of neutrality. This authority to discharge certain consular functions does not give him power, however, to perform the general administrative and notarial acts of a consul toward citizens.

Great care is required to be observed by naval officers to respect the territorial authority of foreign civilized nations in amity with the United States. No armed force or large bodies of men are to be landed for any purpose on foreign soil without permission of the local authorities, except where necessary to prevent injury to the United States or for the protection of the lives or property of Americans. Even in these cases, if it be possible, the assent of the local authorities should be obtained. No jurisdiction or police control exists even over their own men unless territorial jurisdiction is waived by word or implication by the local authorities.

Naval officers are directed to protect all merchant vessels carrying the American flag when engaged in lawful occupations, and they are expected to advance the commercial interests of their country, always acting in accordance with the rules of international law as well as with existing treaty obligations.

It is forbidden to allow any vessel of war of the United States to be searched by any person representing a foreign State, or to allow any of the officers or crew to be taken out of her so long as there is power to resist. If force is used, it must be repelled by force.

As the boats of a ship of war are regarded in all matters concerning the rights, privileges, and comity of nations as parts of the vessel herself, it is required that, in ports where hostilities exist or are threatened, boats away from the ship should be in charge of some proper person, and that their national character should be plainly evident.

The assemblage of a court-martial in any place subject to foreign jurisdiction is also forbidden. The proceedings of a court-martial or any similar body instituted in contravention of this rule would be wholly invalid.

Chapter V.

Amicable Settlement of Disputes; Measures Short of War.

Section 33.—Treaties.

By the regulations of the United States Navy, the senior naval officer in foreign countries is directed to guard against any actual or threatened violation of treaty rights to the injury of the United States or its citizens on the part of foreign authorities.

Treaties are not international law, for they bind only the contracting States; but they generally show the coming change in that law. As soon as the change is accomplished there is no longer need of treaty stipulations.

As contracts between nations, treaties are subject to a certain extent to the rules of international law. Perhaps the most important question in relation to treaties is that of the binding effect of their obligations when the treaty is once made. Unlike private contracts, treaties are not, of course, subject to enforcement by an authoritative tribunal, but, therefore, there is the more reason that the moral duty of the fulfillment of treaties should be strictly observed.

So far as the United States are concerned, some of our gravest international controversies have been caused with reference to treaties, both with respect to their interpretation and in regard to the obligations that exist and arise under them. The treaties of 1783 and 1818 and the Clayton-Bulwer treaty are instances where much controversy has arisen.

International agreements sometimes are rather arbitrarily divided into two classes—treaties and conventions. Treaties, as a rule, are agreements of a general nature bearing upon political or commercial subjects, while the word "convention" is used for those of minor importance or relating to specific subjects. Such are consular conventions, postal conventions, etc.

At times agreements take the form of declarations and protocols. The declarations of Paris and St. Petersburg are among the former, the first being the well-known declaration as to maritime war and privateering, the latter as to explosive bullets, etc. The protocol concluded in 1874 giving foreigners the right to hold real estate in the Ottoman Empire is an example of the latter form. Generally speaking, a protocol is the official minute of the sessions held during the process of negotiating a treaty, duly drawn up, with the conclusions agreed upon, and signed at the end of each session by the negotiators.

The right to negotiate treaties is one of the fundamental attributes of national sovereignty. In a monarchy the treaty-making power is in the hands of the sovereign, with more or less restriction; in a republic, in the hands of the chief executive, assisted by his ministers or some assembly of the State. In the United States, for example, the President can only conclude treaties by the advice and consent of the Senate expressed by a two-thirds vote. As Commander in

Chief of the Army and Navy, however, the President can alone, in the exercise of his military powers, conclude an armistice or arrange a convention with an enemy.

A sovereign must, of course, be actually in power to be able to negotiate treaties, as then only he represents the State with its inherent capacity for treaty making and treaty fulfillment. It is rare, however, that sovereigns treat directly or even sign treaties; such acts are delegated to their ministers or to special diplomatic agents.

After the negotiation of the treaty comes the act of ratification, which transfers the matter from the hands of the agent of the government to the supreme authority of the State and gives to that authority the duty of assuming the execution of the treaty.

The right of ratification appertains in a monarchy to the sovereign, either alone or assisted by national representatives, and in a republic to the chief of the executive power, with the consent, direct or indirect, of one of the grand powers of the State. This ratification should be full and without reservation or conditions.

A treaty is not binding until it is ratified by the proper authorities of each contracting State, the right to refuse ratification being as incontestable as the right to negotiate treaties. Unless otherwise specified, however, the treaty becomes operative from and at the date of its signature, and not from the date of its ratification.

A ratification of a treaty which adds to the treaty a condition or modification, or even an interpretation, not contained in the original document, is not, properly speaking, a ratification, but a new treaty, which requires acceptance and a new agreement.

A treaty duly signed and ratified becomes at once obligatory upon the signatory States, but, notwithstanding this, often requires still other procedure before being put fully in operation. It may require some legislation, an appropriation of money, or changes in the revenue or other laws upon the statute books. With us this requires the action of the House of Representatives in addition to that of the Senate.

In regard to a possible refusal of this legislative action, Calvo says that without doubt the political power to which the constitution of each State assigns this duty is in principle free and independent in the exercise of its right; but international comity and proper regard for the supreme authority of the nation imposes upon the legislature the obligation to deliberately and gravely consider the matter, and, if possible, not to refuse its approbation and agreement, but to neglect the questions of mere form and detail, and to occupy itself only with the large and general interests of the nation.

The Constitution of the United States, in Article VI, provides that all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Unless a treaty is a secret one, it is the usage to make it public for the information of the citizens or subjects of a State by means of a public proclamation. Then, if no legislation is necessary to make it operative, it will be executed by the judicial tribunals of the countries concerned, though in its public relations, as mentioned before, the treaty is binding from the date of its signature.

Treaties cease to be obligatory and are abrogated from various causes, such as the completion of the obligations therein provided for; by the expiration of the period for which the treaty has been concluded unless a renewal has been made; by mutual consent; by the

withdrawal of either party when the treaty itself provides for its termination in this manner; by the entire attainment of the particular object for which the treaty was made; when the fulfillment of the treaty becomes morally or physically impossible; by loss of independence on the part of one of the contracting States; by a change of régime or government when the treaty expressly states that it depends upon such régime or government; by the necessities of self-preservation; and finally, by a declaration of war, which suspends, when it does not destroy, treaty obligations between the two States. In regard to the above causes there can be little dispute, except that of self-preservation when it includes self-development. Hall says:

> A treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a State, provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion.

Bluntschli goes much further, and holds the opinion that when a treaty becomes a permanent obstacle to the development of the constitution or the rights of a people it can be abrogated by that State; and also when the condition of things which have been the expressed or tacit base of the treaty is so modified by time that the sense of the treaty is lost or that its execution has become contrary to the nature of things, the obligation to respect the treaty ceases.

Pomeroy quotes Pinheiro-Ferreira as saying in a note to Martens with respect to permanent treaties as follows:

> I speak of those treaties which governments sometimes make with the clause that they shall remain binding forever, or at least until both contracting parties agree to rescind or modify them. Such conventions never have been, nor should they be, taken literally, for it would be absurd to suppose that the present generation could have the right to bind future generations by conventions, good or bad at the time of the inception, that the posterity of one contracting party ought to be sacrificed to the posterity of the other. Treaties bind nations only so long as the principle upon which their validity rests continues to exist—that is, until from the exact and conscientious accomplishment of the obligations which the compact imposes upon each party there can arise no damage which one party can not prevent or against which the other can not be indemnified. * * * Whenever, therefore, two States are placed in the situation which would have justified the recision of a contract between private persons, the obligations resulting from their treaty have ceased to exist.

As to the abrogation by war, it is evident that in case of war between two States such agreements previously existing between them as treaties of alliance, of amity and succor, of commerce and navigation, in a word, all treaty stipulations referring only to pacific relations, cease during hostile relations. It is not necessary to wait the positive declaration of war for this abrogation; the moment the relations become hostile these treaties cease to have effect. In the quasi war between the United States and France in 1798 and 1799 all treaties were considered as abrogated.

There are treaties of another nature, such as those which concern frontier boundaries, the occupation of property, public debts, etc., which are permanent in their character, and during hostilities are suspended only, reviving at the termination of the war.

Those treaties, or parts of treaties, which, however, relate to maritime and land warfare, are not altered or abrogated by hostilities between the contracting parties. These treaties can only be annulled by new treaties or in the manner prescribed by the treaties themselves.

In regard to the order of the execution of a treaty, it seems to be generally conceded that the special provisions take precedence over the general provisions, and other things being equal, that the more

important matters take precedence over the less important. When two treaties, made between the same States at different times, conflict, the later treaty should govern, as it is made, or supposed to be made, in place of the earlier treaty.

When two treaties conflict, however, which have been made with different States, at different dates, the earlier treaty should govern, for it is unfair to violate an engagement made with one party by a later agreement made with another party, without the consent of the first.

Section 34.—Arbitration and Mediation.

When disputes of States lead to war, an entirely new set of international relations is brought into play. But before arriving at that stage, there may be amicable settlement of disputes by means of mediation and arbitration.

As a means of settling international disputes arbitration is being resorted to more and more, and it is looked upon by those who would bring the world into a state of perpetual peace as the means of preventing wars. It seems to be assured that in certain kinds of disputes it will come into general use, and perhaps, indeed, often prevent war. Arbitration has been resorted to by the United States upon several occasions, and has been of great use in settling grave and complicated differences with other countries, notably the Alabama claims and the questions arising in connection with the Bering Sea. Certainly, as Halleck says:

> The precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a State before resorting to arms to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied or injuries received. This moderation is the more necessary as it not infrequently happens that what is first looked upon as an injury or an insult is found upon a more deliberate examination to be a mistake, rather than an act of malice, or one designed to give offense. Moreover, the injury may result from the acts of inferior persons which may not receive the approbation of their own Government.

Arbitration must be made under all circumstances voluntary and not obligatory. As Prof. Montague Bernard says:

> Arbitration is an expedient of the highest value for terminating international controversies; but it is not applicable to all cases or under all circumstances, and the cases and circumstances to which it is not applicable do not admit of precise definition. Arbitration, therefore, must of necessity be voluntary; and though it may sometimes be a moral duty to resort to it, can not be commanded in any form by what is called the positive law of nations.

Phillimore says:

> It can not be laid down as a general and unqualified proposition that it is the duty of States to adopt this mode of trial. There may, under the circumstances, be no third State willing or qualified in all respects for so arduous and invidious a task. Moreover, a State may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters.

In the International American Congress which met in Washington in 1889 certain recommendations with respect to arbitration were adopted with the consent of all the States except Chile and Mexico. These recommendations provide for arbitration under all circumstances except when the questions are such as, in the judgment of any one of the States involved in the controversy, to imperil its independence.

In the question of the northeastern boundary of the United States, which was referred under the treaty of Ghent to the arbitration of the

King of the Netherlands, the United States felt called upon to reject the award made by this arbiter.

Sheldon Amos, in speaking of the universal adoption of arbitration, says:

> The difficulty may be expressed by saying that arbitration seems to be the only means of perfecting relations of order, equity, and mutual confidence between States; the preexistence, however, of which very relations must be treated as a condition precedent to the universal application of arbitration.

Notwithstanding the fearful evils of war and the debts and burdens of all kinds that follow in its train, the great epoch-making wars like that which gave us our independence, the wars of the French Revolution, the war for the Union, the Franco-German war, and the Russo-Turkish war created results that could hardly have been brought about in any other way.

Mediation in the shape of an offer of good offices may, of course, be offered before or during a war by a third State. It may come at the request of the disputing States, or as a result of existing engagement.

Mediation is essentially different from arbitration, as its office is that of reconciliation and moderation rather than of judgment and legal settlement. As Halleck says:

> The task is a very delicate one, and the office of mediator requires great integrity and strict impartiality, for unless he possess these qualities in a preeminent degree his efforts will not be likely to bring about the desired reconciliation of the disputants.

Section 35.—Reprisals.

Formerly, when an individual suffered injuries from a foreign State, he was at times given a letter of reprisal against the State. Reprisals by individuals of this nature are no longer practiced, although permitted by laws still borne upon the statute books.

Reprisals can only be made by the central authority of a nation which has the power of making war. This does not, of course, refer to action which may be required toward peoples who are savage or uncivilized. Circumstances may render it urgently necessary upon the part of a naval commander to act upon his own responsibility in cases of this kind toward peoples from whom redress can not be obtained in any other way. International law, however, does not apply to communities of this kind, although justice and humanity are none the less obligatory in dealings with them.

Hall says:

> Reprisals are resorted to when a specific wrong has been committed, and they consist in the seizure and confiscation of property belonging to the offending State or its subjects by way of compensation in value for the wrong, or in seizure of property, or acts of violence directed against individuals with the object of compelling the State to grant redress, or finally, in the suspension of the operation of treaties. When reprisals are not directed against property they usually, though not necessarily, are of identical nature with or analogous to the act by which they have been provoked. * * * Such measures as those mentioned are prima facie acts of war; and that they can be done consistently with the maintenance of peace must be accounted for, as in the case of like acts done in pursuance of the right of self-preservation, by exceptional reasons * * *; but as a rule, the acts for which reprisals are made, except when reprisals are used as a mere introduction to war, are of comparative unimportance. It is this which justifies their employment. They are supposed to be used when an injury has been done, in the commission of which a State can not be expected to acquiesce, for which it can not get redress by purely amicable means and which is scarcely of sufficient magnitude to be a motive of immediate war. A means of putting stress, by something short of war, upon a wrongdoing State is required, and reprisals are not only

milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case. It of course remains true that reprisals are acts of war in fact, though not in intention, and that, as in the parallel instances of intervention and of acts prompted by self-preservation, the State affected determines for itself whether the relation of war is set up by them or not.

These reprisals are sometimes known as general reprisals to distinguish them from special acts done in the course of regular warfare and in accordance with the laws of war.

Among the reasons given for reprisals are: A refusal to pay debts formally acknowledged; a suspension, without reason, of a treaty obligation; a refusal of reparation for injury or a denial of evident justice; a refusal to pay a just indemnity for losses caused by the fault of the offending State, when its responsibility is plain; a seizure of persons or property of the wronged State, and cruel and unjust treatment of citizens domiciled in a foreign State.

Halleck says:

It is only in cases where justice has been plainly denied, or most unreasonably delayed, that a sovereign State can be justified in authorizing reprisals upon the property of another nation. Moreover, the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded and the demand refused. If it be of an individual, the claimant must first exhaust the legal remedies in the tribunals of the State from which the claim is due, and after an absolute denial of justice by such tribunals, his own Government must make the demand of the sovereign authorities of the offending nation. Although the presumption of law is clearly in favor of the decisions of the lawfully constituted tribunals of a State, yet, if it is plain that justice has been administered partially, and in a different manner to the foreigner than to the subject, the Government of the injured party may, notwithstanding such decision, demand justice, and if it be refused, resort to reprisals.

It is seen from the above that reprisals may be demanded for injuries to private citizens as well as for injuries done to the State, while reprisals may be exercised upon the persons as well as the property of the offending State or its citizens.

The following acts of reprisal without any declaration or existence of war may be regarded as having the sanction of usage and sufficient authority:

(1) The sequestration or seizure of property belonging to the offending State; (2) the sequestration or seizure of property of citizens or subjects of the offending State; (3) the partial or complete suspension of commercial and other intercourse between the two nations; (4) suspension or annulment of treaties in part or in whole; (5) a pacific blockade.

(1) The sequestration or seizure of property of the offending State has been more than once threatened and enforced. This method of reprisal was enforced in the incident known as the Don Pacifico case, when the naval force of Great Britain, in the Mediterranean, in 1849, established an embargo upon Greek shipping and seized several Greek ships of war in the Piræus.

A later case occurred in 1895, when Great Britain, having been unable to secure the required redress and indemnity from Nicaragua for the expulsion of the persons and property of the British vice-consul and other subjects from Bluefields and the Mosquito reservation, sent a naval force to Corinto, a port of Nicaragua, on the Pacific coast, and announced as an ultimatum that unless the indemnity was paid in three days Corinto would be occupied by the British forces. Proper response not having been made, a force was landed and

Corinto occupied. Ultimately, Nicaragua agreed to pay the indemnity within fifteen days after the evacuation of Corinto by the English forces, the payment being guaranteed by Salvador. The payment was finally made, the public property of Nicaragua being in possession of the British fleet during the occupation.

The seizure and occupation of the island of San Juan in 1859 by the United States, although mentioned as a case of this kind, stands somewhat apart, as the United States claimed the island as a part of its own territory.

In 1855 Secretary Marcy wrote to the minister of the United States in China:

> The Chinese Government having persistently refused to pay a claim for personal injuries to a citizen of the United States, which it admitted to be due, the United States minister at China was instructed, at his discretion, to resort to the measure of withholding duties to the amount thereof.

(2) The seizure of private property belonging to citizens of the offending State by letters of marque and reprisal is no longer practiced, but in later times the seizure of such property has been made by national vessels of war. Among recent examples are the seizure of Neapolitan vessels by British men-of-war in 1840, the capture of Brazilian merchant vessels by England off Rio in 1861, and the seizure of vessels by Germany in Port au Prince in 1872. A hostile embargo is practically under this head, being a seizure of vessels of a foreign State in the ports of the wronged State awaiting further events.

(3) The suspension of intercourse had a very practical exemplification in our own history in the years preceding the second war with Great Britain. In 1807, after the attack upon the *Chesapeake*, the President of the United States issued a proclamation excluding British vessels of war from the harbors of the United States.

In 1808 the Committee of the House of Representatives on Foreign Affairs reported in favor of the prohibition of admission of vessels of Great Britain and France. This report was followed by the passage of the nonintercourse act, in 1809, which prohibited all commercial relations with Great Britain and France. In 1870 the President of the United States asked for power to suspend the laws authorizing the transit of merchandise across the territory of the United States to Canada, and further, if necessary, to forbid vessels of the Dominion of Canada from entering the waters of the United States. This was on account of the action of the Canadians toward our fishermen.

An embargo may be considered to come under this head if it is what is known as a civil embargo. By this is meant the act of a State detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it generally is, by a closing of its ports to foreign vessels. A hostile embargo is a seizure, as before mentioned, of foreign vessels and property which may be in the ports of the wronged State. It was formerly not uncommon to place ships of a foreign power under embargo as a prelude to war. This harsh and unfair practice has ceased, and instead a custom has arisen not only allowing ships of an enemy to depart, but also giving them sufficient time to discharge and receive cargo and reach a home port. At the outbreak of the war between Spain and the United States both countries permitted a period of thirty days for such purpose.

(4) In 1798 Congress passed an act annulling all of the treaties with France, which was followed almost immediately afterwards by an act which, without formal declaration of war, authorized the President of

the United States to seize by our armed vessels, public or private, any armed vessel of France, and to have these vessels brought into the ports of the United States, duly proceeded against, and condemned as lawful prize.

The subject of pacific blockade will be treated separately.

Section 36.—Retorsion.

Retorsion is retaliation in kind. If a nation has failed in courtesy, friendship, or good offices; if it has placed discriminating duties or restrictions upon commercial or other intercourse; or if it has in any way given just reasons for offense and no redress is offered or given, then the injured State has the right to take a similar course on its own part in order to bring back the other State to a sense of propriety and justice.

Woolsey says: "The sphere of retorsion ought to be confined within the imperfect rights or moral claims of an opposite party. Rights ought not to be violated because another nation has violated them." This is a little vague. Retorsion in peace and retaliation in war have had a wholesome effect in times past, and have been the effective means of preventing unjust discrimination and violent excess.

Col. G. B. Davis, U. S. A., says of retorsion that "the field within which the principle of retorsion may be applied, already very extensive, is certainly increasing." This state of affairs is due to the fact that the commercial relations of States are increasing in intricacy in direct proportion as they increase in extent and amount, giving rise to frequent conflicts between the business or internal policy of particular States and their external or international policy.

Section 37.—Pacific Blockade.

A measure of constraint, short of war, known as a pacific blockade, has been a not infrequent means of coercion. It has been instituted, sometimes by joint action of several powers, sometimes by a single power; in some cases against all vessels, in others against vessels of the nation concerned alone, and in still other cases against property and cargo only of the offending nation. The penalties have generally been seizure and confiscation or seizure and detention.

Notwithstanding the opposition of some writers upon international law, the practice is a growing one and seems to be fairly well established.

The legal position of a pacific blockade, however, is unsettled, as the attitude of the blockaders toward vessels of the States not concerned has varied with almost every blockade, and the blockade itself has always been applied by a strong naval power against a weaker one as a means short of and better than war. The alternative of war in these cases has not been accepted by the weaker power, for the evident reason of the disparity of forces and consequent hopelessness of successful contest. Pacific blockade is certainly an anomaly in international law, as, though a warlike measure, there are neither belligerents nor neutrals.

Writers on international law are divided as to this question and may be classified in their opinions as follows:

First. Those who think the pacific blockade absolutely unjustifiable, as Hautefeuille, Westlake, Geffcken, Woolsey, and Phillimore.

Second. Those who approve the practice as a necessary evil, if

conducted so as not to affect third States, as De Martens, Calvo, Bluntschli, Hall, T. J. Lawrence, and Fiore.

Third. Those who admit the practice as a reprisal and as one at all events less of an evil than war, and who also believe that the blockade should affect third States—such as Perels, Des Jardins, Holland, von Bulmerincq, and others.

Walker speaks of if at length, as follows :

> Prior to 1827, blockade was held a pure war right, and it may be questioned whether in its wider extension pacific blockade must not justify itself rather as a mode of warfare limited in operation than as a means of redress falling short of war. For the operation of such a measure may extend either to the subjects of the blockading and blockaded powers only or to the vessels of all nations. If it be confined to the subjects of the parties directly engaged, its legitimacy can hardly be a matter for serious consideration. The less is justified in the greater, and the blockaded sovereign has it in his power either to free himself from the inconvenience by the grant of redress or to resent it by the declaration of war.
>
> If, however, the trade of neutrals be affected by the blockade, those neutrals may well protest against interference with their traffic not fully and completely justifiable. For them such protest must be a matter of policy. Pacific blockade may be, and doubtless is, the less of two evils: to refuse to recognize it may be to force the offended State to legalize its acts by instituting a regular blockade as a measure of war. * * *

The first instance of pacific blockade occurred in 1827, when the coasts of Greece were blockaded by the English, French, and Russian squadrons, Greece being then nominally subject to Turkey and the powers were professedly at peace with Turkey. The Tagus was blockaded by France in 1831, New Granada by England in 1866, Mexico by France in 1838, the La Plata by France from 1838 to 1840, and from 1845 to 1848 by France and England; the Greek ports by England in 1850, the coast of Formosa by France in 1884, the coast of Greece by Great Britain, Germany, Austria, Italy, and Russsia in 1886; the Island of Zanzibar, in 1888, by Great Britain, Germany, Italy, and Portugal, and finally the Island of Crete, in 1897, by Great Britain, Germany, Austria, France, Italy, and Russia—the six great powers of Europe.

The blockade of Formosa in 1884 by the French was intended to include neutral vessels as liable to capture and condemnation, notwithstanding that the French Government did not assume the position of a belligerent. The peculiar position it took was due, it is generally considered, to the fact that it was desired to have entire freedom in coaling at Hongkong, which it would lose if it assumed the name as well as the powers of a belligerent. The British Government refused to admit that under these circumstances the French Government had the right in international law to capture and condemn the vessels of neutral nations.

The Greek blockade of 1886 was for the purpose of coercing Greece into abstaining from hostilities which might precipitate a general European war. She had declined to be influenced by advice or threats, and it was not until the blockade gave tangible evidence that the majority of the great European powers were in earnest that Greece submitted. Hall says:

> The instructions given to the British admiral were to detain every ship under the Greek flag coming out from or entering any of the blockaded ports or harbors or communicating with any ports within the limit blockaded. "Should any parts of the cargo on board of such ships belong to any subject or citizen of any foreign power other than Greece and other than Austria, Germany, Italy, and Russia, and should the same have been shipped before notification of the blockade or after such notification, but under a charter made before the notification, such ship or vessel shall not be detained. The officer who boards will enter in the log of any ship allowed to proceed the fact of her having been visited and allowed to proceed;

also date and at what place such visit occurred. * * * In case of detention, steps must be adopted as far as practicable to insure safety of ship and cargo." (Parl. Papers, Greece, No. 4, 1886.)

Incidentally some occurrences took place which must have been beyond the intended action of the powers. For example, at Skiathos part of the Austrian squadron made requisitions of provisions on the island, carrying off so much flour as to exhaust the stock; it also cut telegraphic communication and seized fishing boats.

The blockade of Zanzibar in 1888 was specifically directed against the slave trade, which the authorities of Zanzibar were unable or unwilling to stop. As this blockade was against a specific evil, recognized as such by the civilized world, no international complications were involved.

The blockade of Crete commenced March 21, 1897. Upon that date the naval forces of all of the great powers of Europe combined for the first time in a pacific blockade. The blockade was declared general for all ships under the Greek flag. The ships of the six powers and of those nations who may, for the localized operations, be called neutral, were allowed to enter into the ports occupied by the blockading powers and to land their cargoes, provided they were not intended for the Greek troops in the interior. Merchantmen of the neutral and blockading nations were liable to visit by the blockading ships of war within the limits of the blockading operations, which were comprised between longitude 25° 24′ and 26° 30′ east of Greenwich and between 35° 48′ and 34° 45′ north latitude.

The various civilized Governments of the world were duly notified of this blockade, that of the United States among the number, but so far as it is known no Government officially protested against the institution of this blockade. With the exception of the United States, all of the great powers of the world may be considered to have been active participants in this blockade which was enforced against all nations.

Among measures that were discussed as a means of constraint, by the United States toward Spain, with respect to affairs in Cuba, was that of a pacific blockade. As a matter of fact, a blockade of certain Cuban ports was proclaimed under date of April 22, 1898, while war itself was not formally declared until the 25th of April, though the declaration dated back the existence of war to the 21st day of April.

In 1887 the Institut de Droit International adopted a declaration as to pacific blockades, which stated that the establishment of a blockade without a state of war ought to be considered permissible by the laws of nations only under the conditions that vessels of foreign flags can enter freely, notwithstanding the blockade; that the specific blockade be formally declared and notified and maintained by sufficient force, and that the vessels of the blockaded nation which do not respect the blockade can be sequestered; but that when the blockade ceases these vessels and their cargoes should be restored to their owners, but without compensation.

It can thus be seen that without admitting the pacific blockade to be an established legal means of restraint or reprisal short of war, still the general tendency of writers, and more particularly of the great maritime states, is to favor its exercise, and while it may be desirable that other powers than those concerned should not be involved, still a blockade not applying to all maritime powers would not as a rule be effective or secure the results for which it is instituted.

Section 38.—International Movements for the Mitigation of the Evils of War.

Bluntschli says that of the various modern acts and movements that have tended to ameliorate the evils of war, the promulgation by the War Department of the instructions for the government of the armies of the United States in the field, drawn up by Francis Lieber, LL. D., and issued after modification as a general order, April 24, 1863, was among the first and most remarkable.

Colonel Davis, U. S. A., in his work upon international law, says of these instructions:

> They are still in substantial accordance with the existing rules of international law upon the subject of which they treat, and form the basis of Bluntschli's and other elaborate works upon the usages of war. They are accepted by text writers of authority as having standard and permanent value and as expressing with great accuracy the usage and practice of nations in war.

These instructions treat of martial law, military jurisdiction, military necessity, retaliation, public and private property of the enemy, protection to persons, religion, and to the arts and sciences. They direct as to the punishment of crimes against the inhabitants of hostile countries, as to deserters, prisoners of war, booty on the battlefield, partisans, armed enemies not of the hostile armies, scouts, prowlers, war traitors and rebels, spies, safe conducts, flags of truce, messengers, parole, armistice, capitulation, assassination, etc. Although revision would doubtless be made in the case of a great foreign war, still they contain very much that would be useful in time of war to the naval service and that should become familiar to officers of the Navy and Marine Corps.

In 1880 the Institut de Droit International adopted a code of "Laws of war on land," based upon these instructions for the government of armies of the United States, upon the articles of the Geneva conventions of 1864 and 1868, upon the declarations of St. Petersburg and Brussels, and upon the official manuals adopted by France, Russia, and Holland. This code has certain differences, some of them improvements, from the instructions adopted by the United States, but as it has not been adopted generally by the powers it may be considered as a movement rather than as an authoritative act.

The Geneva convention for the amelioration of the condition of the sick and wounded of armies in the field has been generally agreed to by the civilized powers, and was acceded to by the United States, March 1, 1882.

The President of the United States, in his proclamation announcing the accession of this country to the Geneva convention, reserves the promulgation of the additional articles until the exchange of the ratification thereof between the several contracting States shall have been effected and the said additional articles shall have acquired full force and effect as an international treaty.

These additional articles cover the cases of naval warfare and are practically accepted in principle and are given in the appendix. The only States which have not adopted the Geneva convention are Portugal, Brazil, Mexico, Colombia, Costa Rica, Uruguay, and Venezuela.

PART II.

INTERNATIONAL LAW AS MODIFIED BY WAR.

Chapter VI.

General Character of War; Maritime War.

Section 39.—Nature of War.

War changes the relations of all States. The relations of the contending parties, who become known as the belligerents, are at once directly affected by this change from a normal to an abnormal state of affairs, and indirectly the relations of the States which take no part in the war become changed toward the belligerents as they now assume the position of neutrals.

As Phillimore says:

> War, of necessity, brings with it new rights to the belligerents and new obligations to the neutral.

In the early history of nations and of tribes it has been said that war was the normal state of society, or as the philosopher Hobbes put the matter, it was "bellum omnium contra omnes," war of all against all. To-day peace is the normal state and war the abnormal. At present, far from being a struggle for the mastery alone, war is looked upon as a contest in support of the rights of a nation and as a means when all others have failed to bring about a settlement of disputes. War, then, is the last resort of nations, the ultima ratio regum, and the ethical question of right or wrong with regard to the opposing parties has nothing to do with the legal rules applicable to the combat. In the eyes of international law all wars are just, in so far as the belligerent rights of the parties are concerned; that is to say, third States or neutrals are not permitted to hold that one of the parties is wrong and hence not entitled to the rights of war.

Wheaton says with regard to war that—

> The independent societies of men called States acknowledge no common arbiter or judge except such as are constituted by special compact. The laws by which they are governed are deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has, therefore, a right to resort to force as the only means of redress for injuries inflicted upon it by others in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself what are the nature and extent of the injuries which justify such a means of redress.

Since the time of the Thirty Years' war there has been a steady improvement in the usages of war, caused partly by the influence of

the writings of Grotius and his successors, and partly by the general progress of civilization, in which the sentiments of humanity and justice have come to prevail over those of barbarity and greed.

The rules of the law of nations have been gradually extended and accepted during the last two hundred years, until to-day they control to a very large extent the usages of war in all civilized countries.

What are called the laws of war form a very important part of the law of nations or international law.

War has been defined to be a hostile contest with arms between two or more States or communities claiming rights of sovereignty.

Creasy says:

> That there have almost always been wars, and that wars will again occur, are melancholy certainties, against which it is vain to shut our eyes. It is equally certain that a nation which professed an intention never to engage in war would, if its professions were believed, be very soon insulted, maltreated, and oppressed by other nations, and that such a pacific course on its part would most likely end in its dismemberment and national destruction.

It is not safe to indulge in the pleasant illusion, either, that wars can be stripped of all their horrors or of all their burdens. The long peace from 1815 to the Crimean war was a period of peace societies which cherished visions of perpetual peace and good will, and of philanthropic writers who would remodel the laws of war so that war was to become a mere duel between the armed forces of nations.

The old theory as to war was that all citizens or subjects of one belligerent State were enemies of all citizens or subjects of the other. The new theory advanced is that war is a contest between State and State, and that private citizens of the belligerent parties should not be molested either as to their persons or their property.

The practice and usage of the present day do not conform to either theory. The true view is more likely found in a mean of the two theoretic extremes. The old theory is, of course, wholly contrary to the humane spirit of our time, yet the new would tend to cripple weaker and unmilitary nations in repelling the attacks of powerful and essentially military States.

Certainly upon the invasion of a foreign country a general uprising of its inhabitants can not be prohibited by reasonable rules of warfare. Furthermore, such an invasion is generally accompanied by heavy demands upon the inhabitants by way of requisitions and contributions for whatever is necessary for the subsistence of the invading army, so that invasion is not a mere affair confined to the government. This levying of contributions is done in a regular manner, to be sure, but it is virtually the confiscation of private property, and often on a very large scale. It differs mainly from the old pillage only in being so regulated. At sea private property is still subject to capture by the rules of international law, and it is made a reproach in maritime wars that this rule is less liberal than in land wars. Sir Henry Maine, quoting from a manual drawn up for the English army, says:

> The object of wars, politically speaking, is the redress by force of a national injury. The object of war in a military point of view is to procure the complete submission of the enemy at the earliest possible period with the least possible expenditure of men and money.

The accomplishment of this object may often be promoted to an indefinite extent by depriving the enemy of resources which happen for the moment to be private property, but which ultimately are at his service.

SECTION 40.—DECLARATION OF WAR.

Wheaton says:

The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of the State. The exercise of this right is regulated by the fundamental laws of the municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation.

But with respect to the United States no such rights can be delegated. The exercise of the war-making power is vested in Congress, and the President of the United States has no constitutional right or authority to make war or to order aggressive hostilities to be made. He is directed and authorized, however, by the statutes of the United States* in times of insurrection, invasion, or rebellion, or of imminent danger thereof, to call forth troops to suppress such insurrection or rebellion and to repel such invasion.

In 1857 Secretary Cass wrote as follows to Lord Napier in regard to a proposed combined expedition in China:

Our naval officers have the right—it is their duty, indeed, to employ the forces under their command, not only in self-defense, but for the protection of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary: but military expeditions into Chinese territory can not be undertaken without the authority of the National Legislature.

Declaration of war between two independent nations.—As between two independent States, war may begin by a formal declaration or by actual hostilities without any declaration. Halleck says:

It was customary in former times to precede hostilities by a formal declaration communicated to the enemy. This was always done by the ancient Greeks and Romans, but in modern times such formal declaration has fallen into disuse.

In a compilation of cases of hostilities without previous declaration extending from 1700 to the present time, Colonel Maurice of the British army found but 11 out of 118 instances in which a declaration of war preceded hostilities. In some cases there was not even a manifesto, and the intention was to gain an advantage by surprise.

It is now generally agreed that a manifesto or declaration within the territory of the State declaring the war is necessary in order to warn at least the citizens of the State and neutrals. Thus in 1812 Congress passed an act containing a declaration of war to be issued by the President, but the act was not communicated to England. Hostilities began, however, immediately.

In 1846 the war with Mexico was not only begun, but the battles of Palo Alto and Resaca de la Palma were fought before the formal declaration of war of May 13, 1846, which in its terms recognized the state of hostilities as existing by the act of Mexico. This arose partly on account of the annexation of Texas by the United States, and hence an invasion of Texan soil by Mexico—which latter country still regarded Texas as part of Mexican territory—became an invasion of the territory of the United States, and warlike measures were within the powers of the President.

In 1870 war was determined upon in the French Chambers the 16th of July, and on the 19th a formal declaration was handed to the Prussian Government at Berlin. In the case of the *Teutonia* the judicial committee of the English privy council held that the date of the beginning of the war was the 19th and not the 16th, the ground being that

*U. S. Rev. Stat., secs. 1642, 5297, 5298, 5299.

no act of war had been committed before the declaration. The war of 1877 between Russia and Turkey was also formally declared.

In the China-Japanese war of 1894 hostilities were begun before the declaration of war. In our war with Spain formal declaration of war was made by the United States by act of Congress, April 25, 1898, dating back the existence of hostilities to April 21, and by proclamation by Spain on the 24th of April.

The proclamation of the blockade of certain ports in Cuba, as mentioned previously, was upon the 22d of April.

When there is no declaration, war dates from the first act of hostilities, and even if there should be a subsequent declaration, the beginning of hostilities still remains the date of the beginning of the war.

In civil wars.—In a civil war there is never a formal declaration, and the war dates from the recognition of belligerency of the insurgents either by a third power or by some act of war on the part of the legal government, such as a declaration of a blockade, the exchange of prisoners, or the like.

Thus in the case of our civil war in 1861, although Fort Sumter was fired upon on April 12, yet there was no legal war until the proclamation of blockade by President Lincoln on the 17th of April, a blockade being an act of war which affected neutrals.

Section 41.—Maritime War.

Maritime wars have been less barbarous than those on land, and for several reasons. In the first place, there is an absence of that large class of noncombatants with whom armies come in contact on land; again, in maritime wars neutrals are interested to an important degree, and they have been able to make their influence felt in restraining the excesses of belligerents; and finally, the seizure of property is regulated by prize courts composed of men of judicial training, and not subject to the excitement surrounding warfare.

As to the distinction between enemy's property at sea and land, Richard Henry Dana says:

> Where private property is taken it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property not liable to direct use in war when on land. Some of the reasons for this are the infinite varieties of the character of such property—from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of noncombatant persons and animals; the unlimited range of places and objects which would be opened to the military, and the moral dangers attending searches and captures in households and among noncombatants. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea upon which it is sent is res omnium, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field, and it is the usual object of revenue to the power under whose government the owner resides.
>
> The matter may then be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some

are of this character and some not. There are very serious objections of a moral and economical nature to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea these objections apply with so little force that the prima facie right of capture remains.

England, as the great sea power, has constantly refused to discuss any proposition having for its end the abolition of the right of capture of private property at sea. Without favorable action upon her part, it is doubtful whether this war right, which may become so powerful a means of coercion toward an enemy, will be given up generally, Common consent and mutual agreement can only end its exercise.

Lord Palmerston said in 1859:

The existence of England depends upon her maritime preponderance, and she could not maintain herself if she were deprived of the right to capture the private property of the enemy and to make prisoners of the crews of its merchant ships. A maritime power like England can not renounce any proper means of weakening her enemies, and if she did not take as prisoners the sailors of their merchant ships they would soon be employed in fighting upon the ships of war. Besides, private property is no more respected on land than in maritime wars: for an army, when it invades an enemy's country, takes whatever it has need of.

In the case of the Franco-Prussian war of 1870, the French having a superior navy blockaded the German ports and captured 90 merchant vessels with their cargoes, the value of which, says Barbon, did not much exceed 6,000,000 francs. During the same period the German armies in France took, by way of requisition and contributions, property valued at more than 600,000,000 francs, not counting the unavoidable damage caused by the march of the armies.

In 1866 Austria and Prussia, on the outbreak of war between them, declared that enemy ships and cargoes should not be captured so long as this indulgence was mutual, and hostilities were carried on between these States and between Austria and Italy without capture of private property at sea.

In 1870 Prussia issued a decree exempting French merchant vessels from capture without the requirement of reciprocity; but when France followed the established usage of capture of private property Prussia withdrew her decree and announced her intention of also making such captures.

The principle of the United States has varied at times from its practice, the principle advocated being in favor of the abolition of the capture of private property, but in the war of the Revolution and during the war of 1812 as well as in the late Spanish war many captures were made. In the war with Mexico and in the civil war little private property of the enemy was captured, in both of these wars the enemy being practically without a mercantile marine. In 1871 a treaty was drawn up between Italy and the United States providing for the exemption of private property from capture at sea between those powers.

As to the policy of taking private property, Von Moltke wrote:

The greatest benefit in the case of war is that it shall be terminated promptly. In view of the end it should be permitted to use all means save those which are positively condemnable. I am by no means in accord with the declaration of St. Petersburg when it declares that the weakening of the military forces of the enemy constitutes the sole legitimate procedure in a war. No, it is necessary to attack the resources of the government of the enemy, his finances, his railways, his provisions (stores), and even his prestige.

Von Moltke did not believe in the efficiency of military codes or regulations to prevent lawlessness of armies; he claimed to find the best

remedy for this in thorough discipline and an efficient commissary. It is still a question whether the policy of removing the burdens of war from the noncombatant class would tend to make wars less frequent or to lessen their duration; and upon the whole there is a certain vigorous common sense in the views of Von Moltke. His views were strongly applied in the Franco-Prussian war, and it must be said that the conduct of that war on the part of the Germans, the seizure of the Provinces of Alsace and Lorraine, and the exaction of the enormous indemnity of 5,000,000,000 francs caused a shock to those who believed that the character of wars had changed. There was no lawless plundering by an undisciplined soldiery, but never in modern times has the hand of war weighed more heavily upon a beaten nation during the entire period of hostilities.

From the present outlook on the continent of Europe it seems probable that no sentiments of humanity will stand in the way of striking hard at every resource of the enemy, and instead of exemption of private property at sea from capture, great preparations are being made for the destruction of the enemy's commerce and food supply. Not only is commerce destroying probable, but also the levying of contributions and exactions from rich seaport towns.

Section 42.—Privateers; Volunteer Navy.

By the declaration of Paris the signatory powers agree that privateering is and remains abolished. This declaration has been acceded to by almost all of the maritime powers. The declaration is not binding except between those powers who have acceded to it.

The United States have taken somewhat varying position toward privateering. After the revolutionary war treaties were made providing for its abolition, especially with Prussia in 1785. During the war of 1812 privateering was extensively practiced. During the Mexican war it was not practiced upon either side. In 1856, when it was proposed to the United States to accede to the Declaration of Paris, the Government declined unless private property at sea was exempted from capture.

In the early days of the civil war the United States expressed a willingness to accede to the declaration of Paris under certain conditions, which were not accepted by the European powers. In 1863, during the same war, a law was passed by Congress providing for the issuing of letters marque and reprisal by the President, but the law was never put into execution.

As to the policy of privateering, Woolsey says:

> The right to employ this kind of extraordinary naval force is unquestioned, nor is it at all against the usage of nations in times past to grant commissions even to privateers owned by aliens.
>
> The advantages of empowering privateers are (1) that seamen thrown out of work by war can thus gain a livelihood and be of use to their country: (2) a nation which maintains no great navy is thus enabled to call into activity a temporary force on brief notice and at small cost. On the other hand, the system of privateering is attended with very great evils. (1) The motive is plunder. It is nearly impossible that the feelings of honor and regard for professional reputation should act upon the privateersman's mind. * * * (2) The control over such crews is slight, while they need great control. * * * The officers will not be apt to be men of the same training with the commanders of public ships and can not govern their crews as easily as the masters of commercial vessels can govern theirs. (3) The evils are heightened when privateers are employed in the execution of belligerent rights against neutrals, where a high degree of character and forbearance in the commanding officer is of especial importance.

The conditions of modern naval warfare have lessened the desirability of privateering from the standpoint both of the privateer and the national government. The prizes worth capturing now would be steamers, and for this reason privateers would necessarily be steamers also. The cost of steamers, of their maintenance, and the difficulty of obtaining coal abroad would render privateering very expensive and uncertain, especially as the remunerative prizes would be the large, fast, and probably partially armed merchant steamers without convoy. The difficulty of capturing these and of getting them into port after capture would render privateering a very doubtful financial venture, especially as without proper adjudication and sale, which could only be done in a home port, the privateer would have no recompense.

Moreover, from a national point of view, seafaring men thrown out of employment in war time would be needed in the naval service and would be readily absorbed by the regular men-of-war. As privateers would at first offer hopes of plunder with short terms of service the absorption of seafaring men by this class of vessels would certainly cause a scarcity of men for ships of war, especially as the crews of the privateers would, when captured, be retained as prisoners of war, and this scarcity of seafaring men would become instead of a temporary evil a permanent one. It would be much wiser as a national policy to take vessels fit for this kind of work into the navy from the merchant service and give their officers, if needed, acting appointments from the national authority.

The proclamation of the President of the United States of April 26, 1898, announcing the war with Spain, stated the policy of the United States to be to adhere to the rules of the Declaration of Paris, and not to resort to privateering. Spain, in her decree of April 24 of the same year, while reserving her right to grant letters of marque, announced her intention for the present to confine herself to the organization of a force of auxiliary cruisers under naval control. It is extremely doubtful whether the United States will ever again resort to privateering.

In August, 1870, during the Franco-German war, notwithstanding that France and Prussia were both signatories to the Declaration of Paris, Prussia ordered by decree the creation of a volunteer navy. The ships of this navy were to be private property, the officers and crews were to be merchant seamen, furnished by the owners, but under naval discipline and wearing uniforms, the officers provided with temporary commissions, but not forming part of the regular navy in any way, though the vessels were to sail under the flag of the North German navy. The French Government protested against this proposed employment of private vessels as a violation of the Declaration of Paris, and addressed a dispatch to the English Government, who referred the matter to the law officers of the Crown, who in turn decided that the difference between the proposed volunteer navy and privateers was so great that it could not be considered an evasion of the Declaration of Paris.

Hall, an English authority, however, says:

> Unless a volunteer navy were brought into closer connection with the State than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris.
>
> The incorporation of a part of the merchant marine of a country in its regular navy is, of course, to be distinguished from such a measure as that above discussed.

As to captures by a private vessel not commissioned in any way by the national government, Halleck says:

> All agree that defensive hostilities on the high seas, as well as on land, without a commission or public authority, are not criminal acts, but acts fully authorized by the laws of war.

Walker, a late English authority, says upon this point:

> An ordinary uncommissioned merchantman belonging to a belligerent State may, of course, resist capture, and therefore seize in self-defense, but ought not in general to attack. If, nevertheless, an uncommissioned master elect to lay aside his noncombatant character and attempt to make prize, he is, as between himself and the enemy government, a lawful combatant, and there is no excuse for his treatment otherwise than as such.

Hall says upon this point:

> Noncommissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews, therefore, which make such resistance have belligerent privileges; and it is a natural consequence of the legitimateness of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war.

It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, rather than seek convoy, and the defense could be legitimately carried to the point of a seizure of the attacking vessel, or a recapture if once taken. Without proper commission a private vessel, however, should act only directly or indirectly on the defensive, and not go out of the way to capture enemy vessels. It can not, of course, take any belligerent action toward vessels of a neutral power.

Some great steamer lines are liable to incorporation into the navy or transport service in time of war, and have an official connection with the government through subsidies, subventions, or their official and enlisted personnel. Such vessels become public naval or transport vessels when so incorporated, and have a legitimate standing. The Russian volunteer fleet and the steamers of the larger British, French, and American lines are examples of this nature.

Chapter VII.

Effect of War as Between Enemies.

Section 43.—Effect of War as to Persons.

Combatants and noncombatants.—According to the rules of warfare the citizens of the belligerent States are broadly divided into two general classes, namely, combatants and noncombatants. Of noncombatants but a few words need to be said. As the name implies, they are that portion of the inhabitants not bearing arms, but engaged in peaceful pursuits. In their persons they are by modern usage exempt from hostile attack. They may not be killed or illtreated unless they commit acts which are deemed dangerous or injurious to the cause of the opposing belligerent. They are, however, exposed to all the personal injuries which may result indirectly from military or naval operations, as the firing upon a ship carrying passengers or the bombardment of a town or other acts of war. The noncombatant population of districts that are invaded or are in the occupation of an enemy may also be compelled to perform certain services to an enemy.

Combatants are those who take an active part in hostilities, and as a rule are regularly authorized by the government to bear arms against the enemy and enrolled in the organized army or navy of the State. To such persons are accorded, without question, all the rights of war; they are the legal belligerents, and if taken prisoners they may not be sentenced to death, but are entitled to honorable and proper treatment.

A class that comes rather between combatants and noncombatants are officers and seamen navigating the merchant vessels of a belligerent State. The members of this class are different from ordinary combatants in that they can not properly make aggressive war, and they also differ from ordinary noncombatants in that they can fight to defend their vessel if attacked, and fight to recover it if captured. Under these circumstances they are combatants and treated as such. If, however, while part of a merchant vessel they attack other merchant vessels they can be subjected to all the severities which the rules of war permit against noncombatants on shore who perform hostile acts against an enemy.

The question has been raised, and notably since the Franco-German war of 1870, whether certain classes of men who bear arms against the enemy are entitled to be considered as combatants. The German authorities contended in the war referred to that the French corps of franc-tireurs and the national guard (militia) should not be considered as regular soldiers unless they wore a uniform recognizable at gunshot, and some of the German generals published proclamations to the effect that if taken they would be executed. It was also declared that in order to be entitled to be treated as prisoners they

must show that they had been called under the flag by legal authority and that their names were on the list of some organized military corps.

The form of such a proclamation as actually issued in the department of the Ardennes December 10, 1870, was as follows:

> Every individual who does not form a part of the regular army or of the garde mobile, and who may be found in arms, whether he goes under the name of franc-tireur or any other, whenever he shall be seized in flagrante delicto engaged in hostilities against the German troops, will be considered as a traitor and will be hanged or shot without form of trial.

The uniform of a franc-tireur was a blue blouse with red trimmings and a kepi, and their corps was organized according to law. The franc-tireurs were attached to the army corps or divisions, and were under the orders of the corps commanders.

The French Government replied that if the franc-tireurs were not treated as regular combatants the corps commanders of the French armies would resort to reprisals toward the German landwehr and landsturm.

The Prussian landsturm as instituted to take part in the war of liberation in 1813 was not supplied with uniforms, being, in fact, the ordinary peasantry of the country. The same is true, in the main, of the Spanish and the Portuguese guerrillas who took part in the Peninsular war against the French. The Prussian proclamation against the franc-tireurs was therefore hardly in accordance with the ordinary usages of war, or with Prussia's own practice in her earlier wars with the French.

There is no doubt as to the illegality of an attempted performance of the part of an innocent farmer and an active combatant. Tillers of the soil who, with arms in hiding, pick off stragglers and individual soldiers are properly liable to the severest penalty of the laws of war.

International law naturally forbids the enrollment by civilized nations in their armies of savages, to whom the laws of war are unknown, or the employment as auxiliaries of such persons as troops who neither know nor respect the rights and usages of civilized peoples.

At the congress of Brussels in 1874 the question of combatants was the most important one under discussion. The great military powers of Europe were, for the most part, in favor of limiting the rights of combatants to the members of the regularly organized armies, thus making it illegal even for a people to rise en masse to repel an invader. England and the smaller States generally opposed this view.

Prisoners of war.—Certain noncombatants may be taken as prisoners of war, such as the monarch and members of the hostile reigning family, male or female, the chief of the hostile government, its ministry and its diplomatic agents, and all persons who are of special use and benefit to the hostile army or its government.

Citizens who accompany an army, such as sutlers, newspaper correspondents, contractors, etc., are liable to be captured and held as prisoners of war. The United States Instructions and the code recommended by the Institut de Droit International include newspaper correspondents among persons liable to capture and detention as prisoners of war. The latter code says that they may be detained for such a length of time only as is warranted by strict military necessity. Hall says very truly that—

> Newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course, and they are quite as often embarrassing to an army which they accompany as to its enemy.

Chaplains, officers of the medical staff, apothecaries, hospital nurses, etc., are not liable to detention as prisoners of war unless the commander has specific reason for detaining them.

Officers and seamen of merchant vessels of the enemy may, according to usage, be detained as prisoners of war upon the ground that they can be immediately employed on ships of war. In 1870 Bismarck denied the right to make masters and seamen of merchant vessels prisoners of war, and he resorted to reprisals and sent Frenchmen of local prominence as prisoners to Bremen in numbers equal to that of the masters of merchant vessels who were detained in France. There is no warrant for such action, and it has been held unjustifiable that such an attempt should be made to prevent an enemy from acting within his undoubted rights by means which are reserved only to punish violations of the laws of war.

A new question arose in 1870 as to the character of persons transported across the enemy's lines in balloons. Bismarck intimated that they would be treated as spies notwithstanding their vulnerability and the publicity of their movements, secrecy and disguise being impossible under the circumstances. This has also been held unjustifiable.

In the proposed manual of the laws of war of the Institut de Droit International, 1880, it is provided that aeronauts charged with observing the operations of an enemy, or with the maintenance of communications between the various parts of an army or theater of military operations, are to be treated as prisoners of war.

In the case of citizens of one belligerent State who are within the territory of the other belligerent at the breaking out of war there have been three rules in operation since the sixteenth century: (1) A right to detain such persons as prisoners. This has now become obsolete, though used by Napoleon against English tourists as late as 1803. (2) To permit these persons to withdraw within a reasonable period. This is still in force by treaty and otherwise, but has been largely superseded by (3), which is to permit them to remain unmolested so long as they conduct themselves peaceably or during good behavior. This last rule is growing in usage and is embodied in many treaties, and will probably become the governing rule. Of course a belligerent will always retain the right to expel such alien enemies as, in his opinion, are dangerous to the State.

Ordinarily it would be a great hardship for merchants and others resident in a foreign country (and the number is large at the present day) if at the outbreak of war they were obliged to remove with their goods.

In 1870 the French Government gave permission on July 20, the day after the declaration of war, for Germans to remain in France; but at a later date the Government so far rescinded this permission as to expel them from the department of the Seine and to require them either to leave France or to retire to the south of the Loire. This act has been harshly criticised, but it was a legitimate war measure if the French Government thought it a military necessity.

By an act of Congress of July 6, 1798, alien enemies are liable "to be apprehended, restrained, secured, and removed." The President of the United States is authorized to execute the law and to make such regulations as are necessary for its enforcement. In cases of complaints against an alien enemy the courts of the United States have jurisdiction and are empowered to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior,

or to be otherwise restrained until the order which may be made concerning his case by the courts be performed. This act, which is still upon the statute books, assumes that aliens may remain if there is no cause of complaint against them. Hall says:

> When persons are allowed to remain, either for a specified time after the commencement of war or during good behavior, they are exonerated from the disabilities of enemies for such time as they, in fact, stay, and they are placed in the same position as other foreigners, except that they can not carry on a direct trade in their own or other enemy vessels with the enemy country.

Section 44.—Conduct of Hostilities.

Certain usages and rules of warfare on land and at sea are treated at more or less length in other chapters and sections. In this section it is proposed to complete the description of the established usage as to the conduct of hostilities, whether in land, naval, or combined operations.

Men who take up arms against one another in public war do not, as one of the articles of our instructions for the government of armies states, cease on that account to be human beings, responsible to one another and to God. The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. Belligerents are expected to avoid all needless severity and all perfidious, unjust, or tyrannical acts. Agreements made by them during the continuance of war are to be scrupulously observed and respected. Religion and morality, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations must be acknowledged and protected during hostilities and in hostile countries.

All municipal law of the land upon which the armies stand or of the countries to which they belong is silent and of no effect between armies in the field; but crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed in a hostile country, are not only punishable as at home, but in all cases in which death is not inflicted the severest punishment should be preferred.

Offenders against the laws of war are liable to the punishments prescribed in the criminal law. In all cases of serious importance reprisals, if necessary, shall not exceed the violation of the laws committed by the enemy. They must be expressly authorized by the commander in chief and conform to the rules of humanity and morality. Reprisals are prohibited when the injury complained of has been repaired.

Before examining in detail what the laws or rules of war prescribe during hostilities and time of warfare, it may be well to quote from Winthrop the definition and scope of the law of war in its international aspect:

> By the term "law of war" is intended that branch of international law which prescribes the rights and obligations of belligerents; or, more broadly, those principles and usages which in time of war define the status and relations not only of enemies, whether or not in arms, but also of persons under military government or martial law, and persons simply resident or being upon the theater of war, and which authorize their trial and punishment when offenders. Unlike military law proper, the law of war in this country is not a formal written code, but consists mainly of general rules derived from international law, supplemented by acts and orders of the military power and a few legislative provisions. In general, it is quite independent of the ordinary law.

The law of war applies to the Navy as well as to the Army of the

United States, the military establishment of the United States in a legal sense being composed of the Army and Navy.

Instruments of war.—With certain exceptions, such as the use of poison, poisoned weapons, of explosive bullets, or of weapons that will cause unnecessary suffering, any instrument of destruction, open or concealed, may legitimately be used against an enemy.

Halleck says:

> The implements of war which may lawfully be used against an enemy are not confined to those which are openly employed to take human life, as swords, lances, firearms, and cannon, but also include secret and concealed means of destruction, as pits, mines, etc. So, also, of new inventions and military machinery of various kinds; we are not only justified in employing them against the enemy, but also, if possible, of concealing from him their use.

In the code recommended by the Institut de Droit International, in 1880, it is forbidden to make use of poison in any form whatever, to make treacherous attempts upon the life of an enemy, to attack an enemy by concealing the distinctive signs of an armed force, or to employ arms, projectiles, or materials of any kind calculated to cause needless suffering. Although these prohibitions are not authoritative, they accord with the best sentiment of the present time.

Case of the sick and wounded and dead.—Sick and wounded officers and men taken in the field or hospitals are prisoners of war and are entitled to receive the same treatment as members of the captured army. Ambulances and hospitals are neutralized by the Geneva convention and should be protected and respected by both belligerents so long as any sick or wounded may be therein. If these ambulances or hospitals are protected by armed troops of the enemy detailed for the purpose, then the neutralization ceases. The rules of the Geneva convention further provide that persons employed in hospitals or ambulances comprising the medical staff, as well as chaplains, shall participate in the benefit of neutrality while so employed and may continue to fulfill their duties or may withdraw and join their forces, being delivered to the outposts of the enemy. In so doing they take with them only their own personal property.

Inhabitants of the country who may bring help to the wounded shall be respected and remain free. The care of the wounded in private houses protects those houses and exempts them from contributions and from the quartering of troops.

The additional articles of the Geneva convention that apply to maritime warfare, though not universally adopted, will most likely be applied and accepted in time of war, and will be found in the appendix. It must be borne in mind that the badge of the Red Cross is adopted by the governments agreeing to the Geneva convention, and although these governments sanction the use of the badge by the various Red Cross societies, they do not convey to these societies the sole use of this badge or a right to use it improperly.

By these rules it is provided that boats picking up the shipwrecked or wounded during and after an engagement enjoy the character of neutrality as far as possible, but the wrecked and wounded picked up and saved must not serve again during the continuance of the war.

The religious, medical, and hospital staff of any captured vessel are declared neutral, and on leaving the ship may remove the articles and surgical instruments that are their private property.

Merchant vessels, no matter of what nationality, charged exclusively with the removal of sick and wounded, are protected by neutrality, but the fact noted upon the ship's log book that the vessel has been

visited by an enemy's cruiser renders the sick and wounded incapable of serving again during the war. The cruiser has the right of putting an officer on board to accompany the vessel and verify the good faith of the operation. The cargo of the merchant vessel is also protected, unless it is of a nature liable to confiscation by belligerents.

The belligerents retain the right to forbid the neutralized vessels from all communication or from any course which may be prejudicial to secrecy. Special conventions may be entered into by the commander in chief in order to neutralize temporarily and specially vessels removing the sick and wounded. Wounded or sick sailors and soldiers when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

The distinctive flag to be used with the national flag in order that the neutrality may be observed is a white flag with a red cross.

Military hospital ships are to be distinguished by being painted white outside with a green strake.

Hospital ships equipped by the Red Cross societies shall, when properly commissioned, be considered neutral by the belligerents. These hospital ships are marked by carrying their national colors and the Red Cross flag, and are further marked by being painted white with a red strake. These ships bear aid and assistance to the wounded and wrecked belligerents without distinction of nationality. During and after the battle they must take care not to interfere with the movements of the combatants, and must do their duty at their own risk and peril.

The belligerents have the right of controlling and visiting these ships, can refuse their assistance and require them to depart, or can detain them if necessary.

Means should be taken, if necessary, to prevent the robbery or mutilation of the bodies of the dead lying on the field; and, when possible, the dead should not be buried until all articles that may serve to establish their identity have been secured.

Attack and siege of fortified places.—Cutting off the food and water supply of a besieged place in order to hasten its surrender is a legitimate means of warfare. Fortified places can be taken by an open assault or by regular siege. If the assault is made no notice is given, as surprise is essential to its success. In case of war the very fact of a place being fortified is evidence that at any time it is liable to attack, and the noncombatants residing within its limits must be prepared for a contingency of this kind. Halleck says:

> A siege is a military investment of a place so as to intercept or render dangerous all communications between the occupants and persons outside of the besieging army. * * * The object of a military siege is * * * to reduce the place by capitulation or otherwise into the possession of the besiegers. It is by the direct application of force that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is for a time a military garrison: its inhabitants are converted into soldiers by the necessities of self-defense.

During the Franco-Prussian war in 22 sieges made by the Germans not a single assault was attempted. It was found to be easier, more effective, and it was claimed more humane to invest the places, seal all approaches, to prevent the supply of provisions or reenforcements, and then by long-range siege guns keep up a constant fire beyond the range of the guns of the besieged. This fire was not concentrated upon the fortifications, but was directed upon the town, and caused such ruin and death that the place was forced to surrender through

famine and excessive suffering. There were cases like that of Péronne, where the town was partially destroyed while the ramparts were nearly intact. There seems to be reason for belief that more lives were saved by this means of attack than by an ordinary siege and assault.

Concerning this method of attack, Hall says:

> The bombardment of a town in the course of a siege, to take an example on the other side, when in strict necessity operations need only be directed against the works, and when therefore bombardment really amounts to an attempt to obtain an earlier surrender than would be militarily necessary, through the pressure of misery inflicted on the inhabitants, is an act which, though permissible by custom, is a glaring violation of the principles by which custom professes to be governed.

The bombardment of Paris by the Germans was commenced without previous notification, and upon a protest being made in January, 1871, by the diplomatic representatives in Paris, Bismarck responded to the effect that—

> No doubt the siege of a fortress containing nearly 3,000,000 inhabitants creates much hardship, but the responsibility rests with those who made the capital a fortress and a battle ground. People who take up their residence in such a place must be prepared for such hardships. Paris is the most important fortress of France and her main forces are concentrated there. Hence there is no reason why the German generals should not fail to attack the city. * * * Even if it were not unwise from a military point of view to allow 50,000 persons to leave the city, we could not grant your demand. We have neither the provisions to feed them nor the means of transportation to remove them with their property.

Bluntschli, German writer though he is, acknowledges that it is the usage to notify an intention to bombard a fortified place in order that the noncombatants, especially the women and children, can remove to a place of safety. He qualifies this, however, by saying that when it is necessary to surprise the enemy in order to carry rapidly a position the neglect to announce a bombardment does not constitute a violation of the laws of war.

Defense of fortified places.—Colonel Davis, in his outlines of international law, says, concerning this:

> The questions of defense in the case of a garrisoned fort and a fortified town are by no means the same. Duty may require a commander in the former case to resist to the last; in the latter, considerations of humanity enter into the problem of defense, and great weight must be attached to them when the question of surrender is presented to him for decision.

To show how much matters have changed in respect to the duration of defense, it may be of interest to state that during the Franco-German war the French military law prescribed the penalty of death to every commander who gave up his place without having forced the besiegers to pass through the successive stages of a siege and having repulsed at least one assault on the body of the place through a practical breach. General Ulrich, in his defense of Strasburg, perhaps the best defense of the war, could not obey this law. He could not repel or even await an assault, it being physically impossible for his men to remain on the ramparts during the fire kept up by the Germans. As a matter of fact no French officer in command of a fortified place was able to observe this article during the entire war.

As there is considerable difference of opinion as to the right of the besieged in case of a temporary suspension of hostilities to revictual the place, or to repair breaches and throw up new works, these matters should always be a subject of special stipulation for the guidance of both the besieger and besieged.

The officer in command of a besieged place is alone the judge of the

duration of his defense, and it may be continued as long as he may consider that it is to the military or other advantage of his government. The judgment of the besieger as to the protracted nature of the defense is not to be considered and will not excuse any undue violence upon his part after a surrender.

Unfortified towns and seaports.—Open or undefended towns, if they offer no resistance, are occupied by land forces to prevent disorder and pillage. They are subject, however, to requisition and contributions.

The propriety of levying contributions upon defenseless seacoast cities has been questioned. They are, it is feared, too tempting a mark to escape, especially when, as it has been pointed out, the same thing is done inland.

In 1882 Admiral Aube, of the French navy, in an article upon the naval war of the future, in the Revue des Deux Mondes, expressed the opinion that armored fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, without regard to whether these are fortified or not, or whether they are commercial and military, and will burn them and lay them in ruins or at the very least will hold them mercilessly for ransom. He pointed out that such would be the true policy of France in the event of a war with England.

This, at the time, was a startling suggestion; and when Admiral Aube was appointed minister of marine and was allowed to change the shipbuilding policy of France to conform to his views, the British Government asked whether this was the official view of the French cabinet. The French Government disavowed any official adoption of this policy of warfare.

The tendency in modern times is growing to exact in money what was formerly destroyed or taken by way of pillage. There is now a greater accumulation of treasure in places and especially in great seaport cities. Notwithstanding all the arguments against it on the ground of humanity, especially from writers of the nation most likely to be affected, it is probable that such exactions of contributions will be enforced in maritime war as they have been in recent times in land warfare. Furthermore, it is difficult to see any great moral distinction in the two cases.

The conference at Brussels declared against the bombardment of open places, but, as Walker says, "the practice of belligerents has hardly attained to this merciful standard, and it may well be doubted how far such moderate counsels would in a future embittered struggle protect from injury the houses and dockyards of a defenseless seaport." Certainly the destruction of such property is less inhuman than that of life.

The bombardment of the unfortified city of Valparaiso by the Spanish fleet in March, 1865, was in consequence of an insult to the Spanish flag and a persistent refusal on the part of the Chilean Government to give any satisfaction. The admiral commanding, who was also intrusted with diplomatic functions, was instructed to make demand for a salute to the Spanish flag by a fixed date, and to enforce the demand, if necessary, by a bombardment of Valparaiso. The demand was made, accompanied by a notice that one month from its date the Spanish fleet would move into the harbor and, firing a blank charge, would wait an hour before commencing the bombardment, when, should it be refused, the vessels would open fire, directing their guns at the public buildings only. Notice was given that all private property would be respected as far as possible, and a request made that

all churches and hospitals should be distinguished by flags in order that the fleet might carefully avoid firing at them.*

Defense of unfortified places.—At one time it was held to be an offense to defend an open and unfortified town or resist in a weak place the attack of a vastly superior force. These views may be considered to be obsolete. Earthworks which can be thrown up in a few hours are very efficient defenses, and they can be gradually so strengthened as to be able to resist heavy artillery. Plevna, for instance, was an open town when Osman Pasha determined to defend it in 1877, but by labor and skill it was rendered so strong that it repulsed three distinct assaults made upon it by the Russians.

Deceit; spies.—Halleck says:

> War makes men public enemies, but it leaves in force all duties which are not necessarily suspended by the new position in which men are placed toward each other. Good faith is therefore as essential in war as in peace, for without it hostilities could not be terminated with any degree of safety, short of the total destruction of one of the contending parties. This being admitted as a general principle, the question arises, How far may we deceive an enemy and what stratagems are allowed in war? Whenever we have expressly or tacitly engaged to speak the truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error either by words or actions. * * * Feints or pretended attacks are frequently resorted to, and men and ships are sometimes so disguised as to deceive the enemy as to their real character, and by this means enter a place or maintain a position advantageous to their plan of attack. But the use of stratagems is limited by the rights of humanity and the established usages of war.

The employment of spies, which is another form of deceit in war, is allowable by the rules of war; but the punishment for being a spy is death upon capture by the enemy.

Winthrop defines a spy as—

> A person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy, or one who, being by authority within the lines, attempts secretly to accomplish such purpose. The information is commonly such as relates to the numbers or resources of the enemy, the state of his defenses, the position of his forces, military or naval, and the like.

An individual found as a spy can not demand a regular trial as a right; he is tried and treated according to the laws in force in the army which captures him. If a spy regains his own lines he can not be treated as a spy if subsequently captured as a belligerent.

The use of foreign or enemy's flag or uniform.—The Regulations of the United States Navy state that the use of a foreign flag to deceive an enemy is permissible, but that it must be hauled down before a gun is fired, and under no circumstances is an action to be commenced or a battle fought without the display of the national ensign.

On land it is not permitted to use the enemy's flag or uniform for purposes of deceit. If for reasons of necessity the enemy's uniform, acquired by capture, is worn it should have some distinguishing mark sufficiently prominent to attract attention at a distance.

Flags of truce.—Communication between belligerents can be established by flag of truce, which is a plain white flag. The bearer of a flag of truce on land who with proper authority presents himself to the other belligerent for the purpose of communication is entitled to complete inviolability of person. He may be accompanied by a bugler or drummer, by a color bearer, and if need be by a guide and an interpreter, all of whom shall be entitled to a similar inviolability of person.

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*Glass, International Law.

The commanding officer of the belligerent to whom the flag of truce is sent is not obliged to receive the flag under all circumstances; if he should receive the flag he has the right to take such measures of precaution as will prevent any injury being done to his cause by the presence of an enemy within his lines. This may be done by blindfolding the bearer, detaining him at an outpost, or in any other manner which may be deemed necessary.

If the bearer of a flag of truce abuse his trust he may be detained, and if he should take advantage of his mission to abet a treasonable action he forfeits his character of inviolability.

In operations afloat the senior officer alone is authorized to dispatch or to admit communication by flag of truce; a vessel in position to observe such a flag should communicate the fact promptly. The firing of a gun by the senior officer's vessel is generally understood as a warning not to approach nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer, having a white flag plainly displayed from the time of leaving until her return. In dispatching a flag of truce the same precautions should be observed.

Firing is not necessarily to cease on the appearance of a flag of truce during an engagement. Should any person be killed under these circumstances no complaint can be made. If, however, it is made clear that the white flag is exhibited as a token of submission, which is not infrequent, firing is to cease.

Quarter; retaliation.—It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No one in command of a body of troops has the right to declare that it will not give, and therefore will not expect, quarter. Quarter should only be refused in case of some conduct on the part of the enemy in gross violation of the laws of war.

A possible exception has been mentioned when, from special circumstances, it is not possible for an armed force to be encumbered with prisoners without danger to itself. This is mentioned in the instructions for the government of the armies of the United States. The opinion of the present day upon this subject is that it is better to liberate the prisoners unless there is reason to believe that they would massacre their captors.

In the case of a violation of the laws of war, the offending persons, if within reach, should be punished. The proposed code of the Institute for the laws of war provides that offenders against the laws of war are liable to the punishment specified in the penal or criminal law of the belligerent in whose power they are.

Where the offending person or persons can not be reached, and if the enemy refuses or neglects to bring him to trial or punishment, the belligerent has the right of retaliation. It should not be resorted to until an opportunity is afforded the enemy for explanation or redress. If possible, the retaliation should be in kind, unless the action of the enemy is in gross violation of the dictates of humanity and of civilized warfare.

Reprisals.—A reprisal consists of the seizing of the property or persons of an enemy as indemnity or security for injury inflicted in violation of the laws of war. The proposed code of the Institute says:

Article 85. Reprisals are formally prohibited in all cases in which the injury complained of has been repaired.

Article 86. In all cases of serious importance in which reprisals appear to be absolutely necessary they shall not exceed in kind or degree, nor in their mode of

application, the exact violation of the law of war committed by the enemy. They are only to be resorted to with the express authority of the general in chief. They must conform in all cases to the laws of humanity and morality.

Exemption of coast fisheries.—The question as to the exemption of the boats and men employed in the coast fisheries of a belligerent State from capture and interference by an enemy is often discussed. It has not been the rule to capture such boats and fishermen, though no exemption has been claimed for deep-sea fisheries except by the inhabitants of Nantucket during our war of 1812.

During the wars of the French Revolution and Empire the danger of the invasion of England was considered so imminent that no means were spared to cripple the French at sea, both with respect to fighting and transporting power. As a consequence the boats and men belonging to the French coast fisheries were captured. France protested and continental writers generally claim exemption for coast fisheries in time of war, but such exemption can not be claimed as a rule of international law, and when similar circumstances arise similar action may be anticipated in a maritime war.

Submarine telegraph cables.—There is little doubt as to the right of one belligerent to cut, destroy, or interfere with a telegraph cable or terminal station, no matter by whom owned, in the territory, land, or water of the enemy whenever military necessity requires it. The belligerent concerned is naturally the judge of this necessity. The right of indemnity, even to a neutral owner, is questionable under such circumstances.

As to the cutting or interruption or censorship of a cable outside the territorial waters of an enemy, there is more question. An international convention was made at Paris, in 1884, for the protection of telegraphic communication by submarine cables. Article 15 of the convention, however, expressly states that the convention is not to interfere with the rights of belligerents. It is manifestly an injury to the rights of a belligerent to have a cable in active operation which carries military instructions, dispatches, or possibly money to an enemy. Such a cable is readily convertible into an instrument for the carriage of contraband or to the use of an unneutral service, and neutral instrumentalities engaged in such work are properly subject to interference or confiscation by belligerents.

It would also be an evasion of a blockade to have the cable communication continue with a blockaded or besieged port; and as capture of neutral property upon the high seas is legal in blockade, it would seem to follow that capture, temporary possession, or interference upon the high seas with a neutral cable, leading to belligerent territory, would also be legitimate and proper when military necessity so required. When the communication between neutral countries and when commercial or other innocent intercourse is involved, the best method of dealing with the matter seems to be an official and responsible censorship.

The Institut de Droit International in a meeting held in 1878, adopted the conclusion or declaration that any submarine telegraphic cable that unites two neutral territories should be held inviolable. This is reasonable and proper. If, however, there is a neutral point or landing place interposed between the termini of a cable belonging to a belligerent, it seems but fair that the neutral should exercise a censorship as to messages. A belligerent in such case should provide for this by laying a military cable, if the circumstances should warrant it, independent of neutral territory and of the obligations of a neutral.

Capitulations and cartels.—A capitulation is an agreement entered into by a commanding officer for the surrender of a military or naval force, or for the surrender of a town, fortress, or particular district under his command. Says Halleck:

> The power of the general or admiral to enter into an ordinary capitulation, the same as in the case of the flag of truce, is necessarily implied in his office. So of the chief officer of a town, fortress, or district of country. * * * But if unusual and extraordinary stipulations are inserted in the capitulation which are not within the ordinary and implied powers of the officer making it, they are not binding either upon the State or upon the troops.

Thus, the Sherman-Johnston capitulation of 1865 was disapproved by the General Government because it dealt with political issues.

A cartel is generally understood to be an agreement between belligerents for the exchange or ransom of prisoners of war. Hall extends the definition to include agreements as to direct intercourse, for treatment of prisoners, or generally as to the degree and manner in which derogations from the extreme rights of hostility shall be carried out. A cartel can be made between the commanders in chief or by the governments.

A cartel ship is a vessel employed in the exchange of prisoners or to carry proposals from one belligerent to another under a flag of truce. She is considered as a neutral vessel, and, so far as her service is concerned, is under the protection of both belligerents. She can carry neither cargo nor passengers for hire, nor any ammunition or implements of war, except a gun for firing signals. The authority to employ a cartel ship emanates from the State, but it may be issued by a subordinate officer in the execution of a public duty.

Prisoners of war—Treatment and exchange.—Prisoners of war are prisoners of the government of the captors and are subject to the laws and regulations in force in its army or navy. They must be treated with humanity, and are entitled to their private property with the exception of arms, ammunition, horses, or large amounts of money.

They must give their true names and grades, and they may be confined, but only as a measure of security. The government having the prisoners of war is obliged to support them, and it is considered that, unless otherwise agreed, they should be treated, so far as food and clothing are concerned, upon the same basis as their own troops upon a peace footing. They should be treated also with the regard due to their rank.

Camp followers, or such persons as members of soldiers' families, sutlers, contractors, newspaper correspondents, and others allowed with the army, but not in the public employment of the belligerent, should, when taken, be treated as prisoners of war, but should be held only so long as may be deemed necessary.

If the captor is without the means of subsisting or quartering his prisoners, he should release them on parole. A belligerent should be permitted, says Winthrop, to maintain or assist in the maintenance of his men held as prisoners by the enemy when the latter can not adequately subsist them. In 1865, for example, during the civil war, large quantities of provisions and clothing were sent to Richmond to be distributed to the Federal soldiers held there as prisoners of war. Prisoners should be confined in healthful camps and proper care and attention paid to their health. Any improper, unnecessarily harsh, or cruel treatment of prisoners may be sufficient grounds for retaliation on the part of the other belligerent, or the officials or persons committing such offenses may be held personally and criminally liable.

Capt. Henry Wirz, of the Confederate army, was executed for this offense after due trial by a military commission, the most authoritative condemnation of the treatment being by Confederate surgeons.

A prisoner of war attempting to escape may after a summons be fired upon. If recaptured before being able to rejoin his own army, he is subject only to disciplinary penalties or a more rigorous confinement. If he succeeds in escaping and is subsequently made a prisoner, he incurs no penalty for his previous escape. If he has given his parole, however, he may be deprived of his rights as a prisoner of war.

Prisoners can not be compelled to take any part whatsoever in operations of war. Neither can they be compelled to give information concerning their own army or country. They may be employed upon public works other than those of a military nature, provided such labor is not detrimental to health, nor humiliating to their military or naval rank, or, if civilians, to their social or official positions.

If allowed to engage in private industry, their pay for such services may be collected by the authorities in charge of them. The sums so received may be used for bettering their condition or may be paid to them on their release, subject to deduction, if deemed expedient, of the expense of their maintenance.

Besides food and clothing prisoners of war are entitled to quarters, to medical attendance, and a reasonable allowance of fuel, bedding, and camp equipage. In recent times no labor has been required from prisoners of war except what may be necessary for their sanitary protection, etc. Prisoners of war can be exchanged during hostilities. They may also be released during the continuance of hostilities by ransoms or on parole. An exchange is generally arranged by cartels and is in accordance with strict equality—man for man, rank for rank, disability for disability. By arrangement values expressed in terms of private soldiers can be given to different grades of commissioned and noncommissioned officers.

Thus, in the cartel arranged between the United States and the Confederate States in 1862, it was stipulated that a general commanding or an admiral could be exchanged for 60 privates or seamen, and so on through to the lesser grades, a captain of the army being equivalent to 6 privates, a lieutenant to 4, and a noncommissioned officer to 2 privates.

It is not obligatory on the part of a belligerent to agree to an exchange of prisoners, nor can a prisoner of war be compelled to give a parole.

Ransom of prisoners was common in the seventeenth century and lasted until the second half of the eighteenth. Originally the captor had the right to sell his prisoners as slaves. This right seems to have been modified into a right of demanding ransom from the sovereign who had employed them. Terms of ransom were usually settled by treaty at the beginning of the war. Exchange of prisoners is, in fact, a development from this practice of ransom—payment in kind taking the place of money. Some features of the usage in exchanging prisoners could hardly have come into existence except through the former practice of sale and ransom; notably, the rule that sick and wounded prisoners are of less value in exchange than healthy prisoners.

Parole.—Colonel Davis says:

> A parole is a promise, either verbal or written, made by an individual of the enemy by which, in consideration of certain privileges or advantages, he pledges his honor to pursue, or refrain from pursuing, a particular course of conduct.

Paroles are ordinarily only received from officers, and when necessary are given by officers for the enlisted men of their command. They are accepted from enlisted men only in exceptional cases.

Winthrop states that the parole in its simplest form—

Is a pledge to the effect that the prisoner will not bear arms against the government or armies of his captor during the pending war unless sooner duly exchanged. He may in general, in the absence of specific stipulation to the contrary, legally perform internal service, such as recruiting or drilling recruits, garrisoning posts not on the theater of war, and guarding stores and provisions of war in the interior and paying troops and making purchases on account of the United States. It is preferable that the cartel should indicate specifically what service may or may not be performed by the prisoner under parole.

In case the government to which the individual belongs refuses to allow or recognize parole, it is the duty of the paroled person to return to captivity. Paroles lose their binding force only upon exchange or at the termination of the war. A breach of parole is a breach of faith and an offense against the laws of war which may be punished with death.

Safe conducts and safeguards.—Safe conduct is a pass given to an enemy subject or an enemy vessel by the military or naval commander in chief to pass from one point or place to another. Says Halleck:

Safeguards are protections granted by a general or other officer commanding belligerent forces for persons or property within the limits of their commands, and against the operations of their own troops. Sometimes they are delivered to the parties whose person or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. * * * A guard of men is sometimes detached to enforce the safety of the persons and property thus protected. Such guards are justified in resorting to the severest measures to punish any violations of the safety of their trust.

When a safeguard is given in the form of a guard of men, or a detachment, they are considered to be exempt from attack or capture by the enemy.

Pillage; foraging.—The code of the Institut de Droit International for wars on land forbids the destruction of public or private property unless such destruction be commanded by urgent military necessity, and also forbids pillage even when places are taken by assault.

Requisitions and contributions may be said to have taken the place of pillage in all well-ordered and disciplined forces.

Foraging consists in the collection by military or naval forces, individually or collectively, of fuel, grain, vegetables, and animals for subsistence or other use. This is resorted to when time does not permit regular requisitions.

Section 45.—Effect of War as to Property Rights.

We have seen that the general practice is to permit alien enemies to remain in the country during the war; it is also the practice to exempt their property from seizure, and if they return to their own State to allow them to take their property with them. Formerly, it was quite different; the individual was seized as a prisoner and his property was confiscated. As late as 1814, in the case of Brown *v.* The United States, the Supreme Court of the United States held that by the strict law of war the property of an enemy, if found on land within the country at the outbreak of war, might be confiscated, but it was not the practice, and debts due to citizens of the enemy were subject to the same rule.

The Confederate Congress in 1861, by an act, confiscated property of whatever nature, except public stocks and securities, owned by citizens of States loyal to the Union. By a decision of the Confederate attorney-general this sequestration was extended to debts due to all persons who were domiciled in the Northern States, whether they were citizens of the United States or not. This is the only recent instance in which private debts have been so confiscated.

After a full examination of the authorities and decisions on this question, Chancellor Kent says:

> We may, therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest authorities in this country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy: but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times.

Halleck says, as to English usage in the past:

> While the English text writers and jurists have contended for the right to seize and sequestrate the property of an alien enemy found in British territory at the declaration of war as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that usage and custom have annulled that right. The distinction thus attempted to be drawn between debts and other property is not well founded in reason or authority, but has resulted, apparently, from policy and interest.[1]

Says Woolsey:

> With regard to the shares held by a government or its subjects in the public funds of another, all modern authorities agree, we believe, that they ought to be safe and inviolate. To confiscate either principal or interest would be a breach of good faith, would injure the credit of a nation and of its public securities, and would provoke retaliation on the property of its private citizens.

In respect to property that is immovable, such as lands and houses, belonging to a subject of the enemy and located within the limits of the other belligerent, the general rule of civilized States seems well settled that such property is not to be confiscated. This is founded upon the principle that the State, by permitting these persons—aliens—to purchase and possess such property, comes under an implied pledge to protect them in the possession. Phillimore says in case the income of the estate is sent out of the country to augment the private or public resources of the enemy it may be confiscated during the continuance of the war without any breach of international usage.

It is the established rule and usage that property of the subjects of the enemy found upon the high seas or in the ports or territorial waters of the enemy is in war after a certain time subject to capture and confiscation as prize of war. This is modified, so far as the powers who have acceded to the declaration of Paris are concerned, by the rule which it provides for the exemption of the goods of an enemy from capture, if not contraband of war, when covered by the flag of a neutral power.

Section 46.—Effect of War upon Contracts and Treaties.

Contracts entered into between enemies, that is, between the citizens of two States at war, are legally void absolutely. Ransom contracts form a well-known exception to this rule.

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[1] There is, however, a difference, that property may be serviceable to the enemy in carrying on the war: whereas mere debts, the collection of which is legally postponed till the restoration of peace, have not that quality.

Of contracts between such persons, made before the outbreak of war, some are annulled by the war and some are simply suspended during the war and revive in full force at its close. In the first class are executory contracts, and those especially which would necessitate some intercourse with the enemy, such as partnerships, insurance policies, and contracts for the performance of work, as the building of a ship or house. On the other hand, contracts of debt, as they are called, where there is nothing left to be done except to pay money, are merely suspended, though neither interest nor the statute of limitations runs during the war.

Analogous to these private contracts are treaties between the belligerent States. Treaties which are fully executed, such as cessions of territory, are not affected by the war, but treaties of commerce or treaties granting privileges are abrogated by the war.

Section 47.—Trade with the Enemy.

The effect of war is generally to put a stop to all trade with the enemy. It is illegal unless especially permitted by the sovereigns.

In the general prohibition of trade with the enemy is included all business communication across the hostile lines. Thus, if a citizen of one of the belligerent States possesses property within the other State, he can neither appoint an agent after the outbreak of war to care for his property nor send orders to one appointed before the war. A consequence of this prohibition is the right to confiscate merchandise which is the object of this traffic, and if the attempt is made afloat the penalty extends to the ship and cargo.

It has been well said that a political war and a commercial peace are inconsistent. Dana says:

> The truth is, the most humane and often the most efficient part of war is that which consists in stopping the commerce and cutting off the material resources of the enemy. If cutting off our commerce with him and his with us cripples and embarrasses him, it must be done. * * * It takes no lives, sheds no blood, imperils no households, has its field on the ocean, which is a common highway, and deals only with persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance.

But licenses to trade may be granted in certain cases by the sovereign authority.

During the civil war of 1861 Congress authorized the President to grant licenses in certain cases; but the Supreme Court held that a license granted by the collector of New Orleans to bring cotton out of the Confederate lines, although it was approved by General Banks and countersigned by Admiral Farragut, was not a legal license. It must be specially authorized by the President. The license issued by one State or belligerent does not bind the other State.

In the year 1811 England granted 8,000 licenses to trade with the enemy, and by order in council of April 15, 1854, during the Crimean war, Great Britain also granted permission to her subjects to trade freely to unblockaded Russian ports in articles, not contraband, carried in neutral bottoms. A like policy was also adopted by France and Russia. Says Halleck:

> A license to trade with a port of the enemy does not serve as a protection for a breach of blockade in case the port is blockaded; nor does it afford any protection for carrying goods contraband of war, enemy's dispatches, or military persons, or for a resistance of the right of visitation and search; in fine, it can cover no act not expressly mentioned in the license or implied as a means necessary for its execution.

Ransom.—According to Halleck:

> The term ransom is now usually applied to property taken from an enemy in war and surrendered or restored to the owner on the payment of, or agreement to pay, a specified sum of money, which is called ransom money.

The agreement is usually made in writing, in duplicate, one copy being retained by the captor, which is generally known as the ransom bill, and the other copy in the possession of the captured vessel constitutes its safe conduct. Practically, a ransom is a repurchase of a prize by the original owners, and under it the crew are also released instead of becoming prisoners of war. The captor used to keep an officer of the prize as a hostage for payment, in addition to the ransom bill. Says Wheaton:

> If the ransomed vessel is lost by the perils of the sea before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. * * * Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured vessel from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, to save the most valuable part of the cargo and avoid the payment of the ransom. * * * So, if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom bill, of which he is the bearer, this ransom bill becomes part of the capture made by the enemy; and the persons of the hostile nation who were debtors of the ransom are thereby discharged from their obligation. In England ransom has at times been forbidden; in France it is permitted for vessels of war, but restricted as to privateers; Spain allows it after three prizes have been taken by privateers; while Russia, Sweden, Denmark, and the Netherlands forbid it altogether. The United States permit the practice of ransom under all circumstances.

Section 48.—Commercial Domicil.

With respect to property rights, the character of enemy is not limited to the citizens of an enemy State. Property liable to capture at sea takes its enemy character from the residence of its owner rather than from his nationality. If he has domicil in a belligerent country his property found upon the sea is enemy property, although he be a citizen of a neutral country or of the other belligerent State; and, on the other hand, if a citizen of a belligerent State is domiciled in a neutral country his property found on the sea is neutral property. In such a case a man is said to have a commercial domicil in the country where he resides and is engaged in commerce; but a merchant who has a house of trade in a belligerent country, though he may reside in a neutral State, is, in so far as his property with that house is concerned, a belligerent.

The French rule in this, as in many other cases, is different in a very essential respect from that of the United States and Great Britain. It is that wherever a man may have his domicil his national character impresses itself upon his property. This question of national domicil in time of war is wholly connected with property found upon the sea, and would have little importance if private property were exempt from capture in maritime war.

Time is the principal element in constituting domicile. In most cases it is conclusive evidence. Furthermore, the presumption with regard to domicile is that the party is there animo manendi, and it is for him to explain if he seeks to avoid the consequences of the presumption. The captors are not bound to prove that his place of residence was his actual domicile; but for the redemption of his property he must give such evidence as to his intentions in regard to residence as will disprove the presumption of domicile.

It has been established also that the produce of the enemy's soil is

to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

Though generally the property of a house of trade established in an enemy's country is considered liable to capture and condemnation, this rule does not apply to cases, at the outbreak of the war, of persons who have habitually carried on trade in the enemy's country, though nonresident, and who have not had time to withdraw from such trade. If, however, a person commences such a trade connection or continues it during the war, or if the trade should be of such a nature as to constitute a special relationship between the merchant and the belligerent State, he can not protect himself by his neutral residence.

As an example of the latter may be mentioned the case of an American citizen possessing a tobacco monopoly in Spanish territory, who though a nonresident and transacting his business through an agent, was held to have contracted a Spanish mercantile character.

The Supreme Court of the United States has held that the share of a partner in a neutral house is jure belli subject to confiscation where his own domicile is in a hostile country.

Section 49.—Merchandise in Transit on the Sea.

The right to capture the property of the enemy at sea has led to the larger part of the rules of international law connected with maritime cases.

Goods shipped during war, or in contemplation of war, are at the risk of the consignee during transit.—When a war breaks out between two maritime States having large commerce, merchants of both belligerents will naturally resort to all possible means to protect their property from capture. The most common method, perhaps, is to make it appear that their goods, while in transit on the sea, belong to neutrals. In time of peace merchants residing in different States in shipping goods over the ocean may make any contract they choose with respect to the risk during the transit; they may agree that the title may remain in the name of the shipper or in that of the consignee.

The ordinary custom of merchants has always been that goods delivered to the master of a ship are held to be delivered to the buyer or consignee. In time of war prize courts will not permit any variation from this custom. Otherwise the dealings between belligerents and neutrals would be so arranged that goods in transit on the sea would always belong to neutrals in order to avoid capture.

By the French rule the neutral shipper may assume the risk of goods in transit to an enemy country. This rule, notwithstanding the Declaration of Paris, to which France was a party, is still of some effect. It determines whether goods under an enemy's flag are neutral or enemy. Enemy's goods, by the Declaration of Paris, are still liable to capture if under an enemy flag, while neutral goods are not unless they are contraband of war.

Merchandise shipped to become the property of the enemy on arrival, if taken in transit is to be condemned as enemy's property, by the rulings of English prize courts. If it had been contracted to become the property of the enemy only upon delivery, the capture is considered as delivery.

Transfer in transit and stoppage in transit.—According to the rules of the English and American prize courts, property hostile at the time

of shipment can not change its character during transit by a sale to a neutral. Goods belonging to a belligerent, already in transit at the breaking out of the war, or even when war is imminent, are not allowed to be transferred; that is, sold to a neutral during transit. A transaction of this kind is held to be the same in principle as a transfer in transit during war.

Sir William Scott says:

The nature of both contracts is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from danger of capture when it is likely to occur. The object is the same in both instances, to afford a guaranty against the same crisis; in other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same animo fraudandi and are, in my opinion, justly subject to the same rule.

Although the character of property is not permitted to be changed during transit so as to exempt it from capture and confiscation, nevertheless, says Halleck:

If it be neutral or friendly at the commencement of the voyage, its character may be so effectually altered before its termination as to insure its condemnation. As a general rule, no matter what its character at the commencement of the voyage, if its owner is an enemy at the time of the capture, the seizure is lawful and confiscation a necessary consequence.

In the case of an owner formerly domiciled in a belligerent State who departs with his property for his native country to remain there, there seems to be a just exception to the rule that there can be no change in the hostile character of property in transit by a change in the national character of the owner. Halleck says:

Every consignor, not only at common law, but by a rule of the general mercantile law, has in certain cases a control over the shipment which is technically called a right of stoppage in transitu—that is, a right to countermand the bill of lading and repossess himself of the goods at any time after their shipment and before their arrival at their destined port. The only case in which this right of stoppage in transitu can be legally exercised under the laws of war is, in the expectation, confirmed by the event, of the insolvency of the consignee. * * * The effect of this right when duly exercised is to save property from its liability to capture where the consignment is made from a neutral to an enemy, and to incur that liability when the consignment is made from an enemy to a neutral.

Recapture, and rescue.—As to recapture Wheaton says:

As to the ships and goods captured at sea and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different cases to which they are to be applied. Thus the recapture may be made either from a pirate, from a captor clothed with a lawful commission, but not an enemy, or lastly from an enemy.

The provisions as to recapture under the municipal laws of the United States are to be found in section 4652 of the Revised Statutes of the United States. It adopts the rule of restoration to the original owner, with salvage, at any time before condemnation by a competent tribunal.

Restitution with salvage, and under varying conditions, is made by Great Britain, the United States, Portugal, Denmark, Sweden, Holland, France, and Spain.

It may be considered settled by the case of the *Emily St. Pierre* during the civil war, and by the case of the brig *Experience* in 1800, that a neutral government is not required by executive action to restore a private vessel of one of its citizens which has been recaptured before condemnation to the government of the captors.

Section 50.—Transfer of Flag from Belligerent to Neutral.

The Declaration of Paris, making free ships free goods with the exception of contraband of war, has doubtless had the effect to increase the tendency to transfer belligerent merchant ships to a neutral flag, for the ships could then continue their commerce with impunity. This tendency will probably increase in future maritime wars by the building of swift cruisers—commerce destroyers—which take the place of privateers.

The English and American prize courts hold in respect to the transfer of enemies' ships during war that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion and should be subject to the most searching inquiry. Halleck lays down the following rule:

> The sale of an enemy's vessel to a neutral purchaser, to be valid, must in all cases be absolute and unconditional. The title and interest of the vendor must be completely and absolutely divested. If there is any covenant, condition, agreement, or even tacit understanding by which he retains any portion of his interest, the entire contract is vitiated, and in international law regarded as void. Thus, if the vendee is bound by a condition to restore the vessel at the conclusion of the war, or if the vendor retains a lien on the vessel for a whole or a part of the purchase money, the transfer is held to be colorable and void. Even when the sale is ostensibly absolute, if the vessel continues under the control and management of her former owner and in the same trade and navigation in which she was previously employed, these circumstances are deemed conclusive evidence of a fraudulent intent to cover under the name of a neutral the property of an enemy, and the contract is necessarily adjudged to be invalid. * * * So also if the neutral vendee, although residing himself in a neutral country, continues to employ the vessel constantly in the trade of the country to which she belonged.

The inference from these circumstances is that the transfer was solely to carry on the trade of the enemy without liability to capture, and was thus a fraud on belligerent rights. We find that here again the French rule differs somewhat from that of England and the United States.

France, in view of the difficulty of detecting the fraud in such transfers of ships, refuses absolutely to recognize their validity, the presumption in all cases being that the transfer is fraudulent. While England and the United States admit proof to the contrary, France does not. This has been the French rule for over two hundred years.

During the Crimean war the French rule was applied in two cases, which illustrate the kind of transaction attempted by belligerents. One was the case of a Russian ship transferred to the Tuscan flag by a fictitious sale, with a false date, anterior to the outbreak of the war, and changing the name of the vessel from *Orio* to *Orione*.

The other was the case of a Russian vessel sold at Elsinore by the master of the vessel, without the authority of the owners, to a Danish subject after the outbreak of the war was known. In both cases the ships were confiscated.

During the same war the English prize court was nearly as strict in enforcing the rule, and in the case of the *Christiana*, a Russian vessel sold to neutrals, condemned the ship, because the sale was adjudged fictitious. Any doubt is generally ruled against the vessel.

This matter may easily become a matter of great consequence, especially to a great maritime country like Great Britain, a country whose supply of food and raw material for manufacture might easily become endangered in war with an active naval power. So large a proportion of the shipping of the world is under the English flag that

there are not enough neutral vessels to supply the deficiencies caused by the withdrawal of English merchantmen. A transfer of English vessels to neutral flags, either by sale or mortgage, might readily be so colorable as to lead to seizure and judicial inquiry, which would interfere materially with the carrying trade, the freight rates also being affected by the probable increase of insurance rates.

The transfer of vessels sailing under the Chinese flag to American ownership and flag in the Franco-Chinese imbroglio in 1884–85 opened an interesting question. By this transfer the vessels became American property, but not documented vessels of the United States. They are, as other floating pieces of American property, such as a raft of logs with a flag, etc., entitled to the protection of the naval service of the United States; but ships in international law are something more than mere property. They are engaged in international trade; they carry passengers and goods, and in time of war may be engaged in carrying contraband of war, or enemy persons or dispatches; and yet in the case here in question they have not a single paper required by the rules of international law, except the certified bill of sale as evidence of ownership.

Long practice and departmental decisions have probably fixed the right of vessels, foreign built and American owned, to bear the flag under certain restrictions; but how far this will protect them against a strong belligerent is yet to be tested. In the case of transfer of the Chinese vessels to American purchasers, the French at that time declared that a state of war did not exist, though afterwards they were obliged to assume the position of belligerents.

Mr. Justice Nelson said, with reference to vessels of somewhat similar character, that "they are of no more value as American vessels than the wood and iron out of which they are constructed;" and Mr. Justice Miller, of the Supreme Court, said in a more recent case that "in a foreign jurisdiction or on the high seas they can claim no rights as American vessels."

Chapter VIII.

Military Occupation; Termination of War; Postliminium.

Section 51.—Property of Enemy in His Own Country.

When the territory of a country is invaded by a foreign army, the question arises as to property that may be seized by the invader for his own use.

Public property.—In regard to the public property of the enemy in his own country, it may be given as a rule that the movable or personal property belonging to the State may be confiscated, such as warlike stores, the treasure of the State, moneys, etc., the plant of the State railways and telegraphs, and the customs duties and other taxes. Works of art, the contents of museums and libraries, and the archives of the State are exempt from this rule, as well as religious, charitable, and educational institutions of a public or governmental character.

A notable disregard of this rule was the action of Napoleon I in seizing the famous pictures and statuary of the countries which he conquered. They were restored by the allies in 1815.

During the short Turko-Grecian war, in 1897, it is stated that the commander in chief of the Turkish army in Thessaly was directed to transport to Constantinople all antiquities which he found during the occupation. This spoliation was either ignored or condoned by the European powers in the treaty of peace arranged under their supervision at the close of the war.

At sea public vessels engaged in explorations and scientific research are exempt from capture and condemnation.

Real property, lands and buildings belonging to the State, can not be taken away or sold; but the invader may seize the profits accruing from such real estate, or use the property temporarily for his own purposes.

Private property.—In the case of property of private persons, the rule, as we have seen, is that it is not subject to seizure and confiscation; but this rule is subject to the important exception of requisitions and contributions.

Military requisition consist in levying upon articles needed for the regular consumption or temporary use of the army or naval force. Such articles may consist of food for men or animals, clothes, coal and other fuel, wagons, horses and mules, railway materials, steamers, boats and other means of transportation, naval material, and of skilled and unskilled workmen for various purposes. In the Franco-German war this was extended to beer for the men and tobacco and wine for the officers.

Contributions consist of money payments exacted in addition to taxes from towns or districts, either in line of requisition or by way of fine, and may be demanded only by the commander in chief, by generals commanding detached corps acting independently, or by the

superior civil authority established by the belligerent occupying the territory.

Receipts are given, as a rule, in acknowledgment of the quantities or sums received, partly that they may not be exacted a second time from the same persons and also that the inhabitants may recover the amounts paid the enemy from their own government if, after the war, it chooses to reimburse them. This reimbursement, however, is not ordinarily made, and the individuals who have suffered must bear the loss as one of the casualties of the war. In 1871 the French Government did appropriate 100,000,000 francs to be distributed among those that had been rendered destitute and impoverished by the German invasion.

In some cases generals commanding an invading army have refrained from requisitions on the ground that it was bad policy from a military point of view. They found that they could provide subsistence for their armies much better by paying for the articles needed.

Wellington in invading France in 1813, General Scott during the war with Mexico, and the allies in the Crimean war followed this method. But the reasons were partly military or political and not wholly from motives of humanity toward the people of the invaded territory.

During the Franco-German war the Germans upon one occasion, at Nancy, made requisition for 500 workmen to build bridges, and, as they were not forthcoming at the time specified, the following order was issued: "If to-morrow, January 24, at noon, 500 workmen are not present at the railway station, the overseers first and then a certain number of workmen will be seized and shot on the spot." Generally in this war the right of levying requisitions was put in force with more than usual severity.

Hall says upon this question:

> As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated. * * * At the same time, if they are imposed through a considerable space of territory, they touch a larger proportion of the population than is individually reached by most warlike measures, and they therefore not only apply a severe local stress, but tend more than evils felt within a narrower range to indispose the enemy to continue hostilities.

There is but little doubt that the use of these exactions on a large scale tends to shorten wars, even though the severity of the weight of the contributions may be postponed until after war is over by an assumption of the obligation by the local authorities.

During the civil war in the United States the War Department, by an order dated July 22, 1862, directed that the military commanders within the States of Virginia, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, in an orderly manner seize and use any property, real or personal, which might be necessary or convenient for their several commands, as supplies or for other military purposes, and while such property might be destroyed for military objects none should be destroyed in wantonness or malice. This was followed by an order from the Confederate Government of August 1, 1862, threatening retaliation.[1]

Requisitions and contributions should exceed neither the military necessities nor the resources of the country levied upon. An innocent noncombatant who honestly yields obedience to the occupying power

[1] Glass, International Law.

is entitled to protection against plunder or the levy of irregular contributions. Upon this subject Winthrop declares that—

> Private property can not properly be impressed or taxes or contributions be assessed, except for public purposes. Private effects or funds can not be taken merely to speculate upon or to increase the wealth or capital of the State.

It is also to be noted that the right under military government to appropriate the private property of enemies for any purpose is to be regarded as materially modified where, upon a permanent or continued occupation, an increased measure of protection to persons and property has been guaranteed. So where a commander, in occupying a country or town of the enemy, has formally pledged the government to the holding inviolate of the rights of property of individuals, the seizure of private property by the military authorities will not be recognized as legal.

Section 52.—Character of Jurisdiction of the Invader over Territory Occupied.

At the conference of Brussels in 1874 the majority of the delegates adopted a resolution that—

> A territory is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised.

In the discussion of this article it was said with reason that occupation of a military nature was similar to a blockade, to be exercised and recognized only when and where it is effective. It was urged, and especially by the representatives from the smaller States, that greater power should not be accorded to the invader than actually possessed by him. He should be always in sufficient strength to repress outbreaks at once, and furthermore, if these could not be suppressed and the territory freed itself, it then ceased to be occupied. Hall says:

> An invader may, therefore, fairly demand to be allowed to retain his rights of punishment within the district indicated until the enemy can offer proofs of success solid enough to justify his assertion that the occupier is dispossessed. This requirement might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation, by considering that a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot, or so long as it covers it, unless the operations of the national or an allied army or local insurrection have reestablished the public exercise of the legitimate sovereign authority.

These definitions do not accord with the past theories and practice of the German authorities and writers. During the Franco-German war in 1870 the German armies, by a system of terrorism, by operations in the nature of flying columns or raids, and by threats and penalties, held nominal occupation over territories much beyond the immediate control of their troops.

The tendency of opinion in modern times, with the exception just mentioned, is in favor of requiring the occupation to be actual and not constructive.

The rules in force with the armies of the United States during the latter part of the civil war prescribed that a place or district occupied stood under the military authority of the occupying army, whether any proclamation or warning to the inhabitants had been issued or not.

The immediate and direct effect of occupation of any portion of the enemy's territory is the suspension of all authority derived from the

enemy's government within the occupied district. The judicial and administrative agents of the former government may be retained in their functions at the will of the commander, in which case they are answerable to the latter for the discharge of their duties, and are usually put under oath to do nothing detrimental to the interests of the invading force.

In our jurisprudence the system thus established by an invading force is called military government. Such a government is peculiar in that it is subject to no constitutional or legal restraints other than those imposed by international law and the usages of war. The former laws of the region, so far as they relate to the exercise of public functions, are of no validity against the invader. On the other hand, as the occupied territory lies without the bounds of the nation to which the occupying army belongs, neither the constitution nor the ordinary laws of that nation can have validity there. The result is that the declared will or instructions of the commander, tempered with the humane sentiments of the times and the established practices of civilized warfare, must be regarded as having the force of law within the occupied territory.

According to the rules under which the armies of the United States operate in such a contingency, the military government is expected to be less stringent in places and countries fully occupied than in regions where actual hostilities exist or are expected.

It is also provided that civil and criminal law shall continue in operation unless interrupted by order of the military authority.

It is now considered by most modern writers upon the subject that the occupation by an invader being, as it were, only an incident of the hostilities, brings no permanent change in the national character or allegiance of the population of the occupied territory. The relation existing between this population and the invader during his stay is not one of allegiance, but of constrained obedience, and this state of affairs exists only so long as the invader is able to compel such obedience. Says Colonel Davis:

> If the ordinary laws of the country or any of them are permitted to exist, and if the courts are permitted to administer them, they do so at the pleasure of the commanding general. No guaranties, constitutional or otherwise, are effective against his will, and his consent to their existence or execution may be withdrawn at any time. The occupation is military, not civil, and the invader, in carrying on his government, is controlled by various considerations, among which, from the necessities of the case, those of a military character are likely to prevail.

Although the rights acquired by occupation put the invader in temporary possession of the sovereignty of the territory, he is not justified, unless he proposes a permanent retention of the country, in making any political or constitutional changes in the form of the civil government.

Neither would it be proper, under ordinary circumstances, to change or suspend laws affecting property and private relations or the good order, morality, or religion of the country. Any acts of this kind on the part of the invader become null and void when his occupation ceases. In the manual proposed by the Institut de Droit International it is required that female honor, religious beliefs, and forms of worship must be respected. Interference with family life is to be avoided.

It has been decided by the Supreme Court of the United States that during the occupation of Castine, Me., by the British in the war of 1812 it ceased for the time to be a port of the United States, so far as

the revenue laws were concerned. Upon this basis the customs administration of the captured ports of Cuba, Puerto Rico, and the Philippines was conducted in the war with Spain in 1898.

As to the ports in Mexico held by the United States during the war with Mexico, the same court at a later date held that these ports, so far as importations into the United States were concerned, were foreign territory.

The ground upon which this decision was based was that, although these ports were in exclusive possession of the United States through its military and naval forces, still they had not been incorporated into the Union as a portion of its territory by any act of the treaty-making or legislative power. It was admitted, however, by the court that so far as the citizens or subjects of foreign States were concerned, these ports were territory of the United States.

As to the government of the invading State, Halleck says:

> Neither the civil nor the criminal jurisdiction of the conquering State is considered in international law as extending over the conquered territory during occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering State. On the contrary, it is usually very different in its character and always distinct in its origin.

Ortolan refers in this connection to the case of Villasseque, a Frenchman charged with assassination in the Province of Catalonia, Spain, during French military occupation. The French court of appeals decided that this occupation and this administration by French troops and French authorities had not communicated to the inhabitants of Catalonia the title of Frenchmen, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed.

The same view was held by the Attorney-General of the United States with respect to crimes committed in Mexico during the military occupation of that country by the United States.

Military occupation being obtained by force, and obedience to its authority being an act of constraint, the obligation to obey ceases when this constraint can be thrown off. The right of armed resistance to the authority of the invader is correlative to the right of the invader to govern the occupied territory by force of arms. Such resistance or revolt is made at the risk of those who take up arms, and the penalties in case of failure are generally severe. The right, therefore, is not a legal one. It is somewhat analogous to the right of rebellion against an arbitrary and oppressive government, a right of appeal to force against force, with the risks attending the exercise of the right.

Hall says, in discussing this phase of occupation:

> The invader succeeds in a military operation in order to reap the fruits of which he exercises control within the area affected; but the right to do this can no more imply a correlative duty of obedience than the right to attack and destroy an enemy obliges the latter to acquiesce in his own destruction. The legal and moral relation, therefore, of an enemy to the government and people of an occupied territory are not changed by the fact of occupation. He has gained certain rights, but side by side with these the rights of the legitimate sovereign remain intact. The latter may forbid his officials to serve the invader, he may order his subjects to refuse obedience, or he may excite insurrections.

It has been stated above that such insurgents usually meet with severe penalties. In the instructions for the armies of the United States of 1863 they are called war rebels, and are defined as persons within an occupied territory who rise in arms against the occupying army or against the authorities established by the same. The penalty

given is death, whether the offenders be captured singly or in bands, and whether their action be incited by their own government or not.

It can not be said that present opinion sanctions the severity of the penalty thus adjudged by these instructions. The paragraph in the code recommended by the Institut de Droit International in 1880, based upon that adopted by the Brussels conference, reads as follows:

> The population of the invaded district can not be compelled to swear allegiance to the hostile power; but individuals who commit acts of hostility against the occupying authority are punishable.

This, though indefinite, is less severe than the article contained in our instructions of 1863.

A war traitor is defined by our instructions as a person in a district under martial law who gives information to the enemy. Such an offender is made liable to the punishment of death if he betrays any information concerning the plans, safety, condition, or operations of the troops holding the district. The offense is too similar to that of a spy to cause any serious objection to the penalty mentioned.

So, too, the extreme penalty, as a matter of self-preservation, may be said still to exist in the case of persons who serve as guides to any force intended to operate against the occupying army and who intentionally mislead the officers of that army when serving them as guides, or who destroy telegraphs, roads, canals, or bridges used by them, or set fire to the barracks or quarters of the soldiers. It is not necessary that the extreme penalty be carried out in every case, though the right to award it should be retained.

Naturally the invader has the right of preventing his enemy from obtaining help from the resources of the occupied territory. This may require a commercial blockade along the boundaries of the occupied area and measures to prevent the inhabitants from joining the armies of their legitimate government.

The costs of administration of the country are defrayed out of the produce of the regular taxes, custom dues, etc., which the military government is authorized to prescribe. These costs are considered to have the first lien upon the revenue raised in the country. In the case of Cross *v.* Harrison the Supreme Court of the United States recognized the authority of the President of the United States, as commander in chief, during the Mexican war to impose at San Francisco, in 1847, through the military commander, duties on imports and tonnage as military contributions for the support of the Government and of the Army.

It is not proper to compel the inhabitants to serve in the army of the invader against their own country or, as a rule, to require them to construct or assist in the construction of works of attack or defense against their own government. Emergencies, however, may arise when the inhabitants may be properly impressed for such purposes, but this does not extend to a compulsory bearing of arms against their own country. In the Franco-Prussian war the French peasants were not infrequently compelled to work on the roads and, as mentioned before, on railways. They were also compelled to serve as drivers when their own carts were called out by requisition.

This subject may well be closed by an extract of the opinion of the Supreme Court of the United States as to the scope of military government. In its words the governing authority—

> May do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are

found in the laws and usages of war. * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in times of peace.

Section 53.—Armistice and Truce.

The expressions armistice, truce, and suspension of hostilities or arms are used indiscriminately for various forms and periods of cessations of hostilities.

It seems proper, however, to adopt the following definition of Halleck, who says:

If the cessation is only for a very short period, or at a particular place, or for a temporary purpose such as for a parley, or for a conference, or removing the wounded and burying the dead after a battle, it is called a suspension of arms.

This agreement can be made by the officers immediately in command of the opposing forces, or even by commanding officers of detachments, but the compact extends only to the forces under the command of the contracting parties.

Winthrop defines an armistice to be—

An agreement, general or local—i. e., applicable to the whole army, or only to a particular body of troops or district—for the suspension of military operations in war. Its duration is usually fixed, and official notice of its period and other terms is properly given without delay to all those whom it may concern. During its pendency neither party, in the absence of a special condition authorizing it, may engage in any military work, operation, or movement, at least upon the immediate theater of war, or, under its cover, execute a retreat. If violated by one of the parties, the other is entitled to terminate it, and its violation by private individuals subjects them to punishment under the laws of war and to a liability to indemnify an aggrieved party for losses sustained.

The offense of violation of an armistice may consist in an act in contravention of the terms of the agreement, or in an act wholly inconsistent with the status of suspension. In the Mexican war (1847) a violation of the laws of war was, as claimed by General Scott, committed by Santa Anna in his strengthening the defenses of the City of Mexico during an armistice, and in disregard of its expressed conditions.

A general truce, says Halleck—

Applies to the general operations of the war, and, whether it be for a longer or shorter period of time, it extends to all the forces of the belligerent States and restrains the state of war from producing its proper effects, leaving the contending parties and the questions between them in the same situation in which it found them. * * *

Such a general suspension of hostilities can only be made by the sovereignty of the State, either directly or by authority specially delegated. Such authority not being essential to enable a general or commander to fulfill his official duties, is never implied, and in such a case the enemy is bound to see that the agent is especially authorized to bind his principal.

A truce binds the contracting parties from the time of its conclusion, unless otherwise especially provided, but it does not bind the individuals of the nation so as to make them personally responsible for a breach of it until they have had actual or constructive notice.

If, therefore, individuals, without a knowledge of the suspension of hostilities, kill an enemy or destroy his property they do not by such acts commit a crime, nor are they bound to make pecuniary compensation; but if prisoners are taken or prizes captured the sovereign is under obligations to immediately release the former and to restore the latter.

A general truce is often preliminary to negotiations for peace. Such a general truce was concluded January 28, 1871, between the French and German authorities, and with some special exceptions covered the military operations between the German and French armies, who were obliged to retain their respective positions.

This general truce or armistice applied equally to the naval forces of the two countries, the meridian of Dunkirk being adopted as the line of demarcation; the French naval force being obliged to remain to the west of this line, while any German vessels of war to the west of this line were obliged to return to the eastward as soon as they received notice. All captures made after the conclusion and before the notification of this general truce were to be restored to the original owners, as well as all prisoners made during the interval just mentioned upon either side. This truce, made for twenty-one days, was prolonged until the 12th of March, and was preliminary to the conclusion of peace.

During a general truce, though hostilities cease, each party may in its own jurisdiction do with its armed forces whatever it could do in time of peace. Fortifications can be built or put in order, vessels built and fitted out, troops raised and trained, and warlike stores of all kinds manufactured and collected. Troops can be moved about from one part of the country to another, with the exception of the actual area of hostilities, and ships can be sent abroad and brought home.

In an armistice or special truce the two belligerents should refrain from all military operations directly or indirectly of a hostile nature which could only have been carried on under fire.

Any act which could have been done without regard to the enemy during hostilities may continue to be done during an armistice.

As to the provisioning of a besieged place, as previously mentioned, this should be arranged for by an agreement between the two parties. In a general way, except as indicated above, matters should be so carried on during an armistice as to find both belligerents in precisely the same position in which they were when it began. Nelson's action at Copenhagen during the armistice, and especially during the suspension of hostilities preparatory to the agreement as to the armistice, could not be received as a safe precedent at the present day.

Unless otherwise arranged it is, as a rule, considered that the prohibition of general intercourse, both commercial and personal, which exists during the war should remain in force during an armistice.

Section 54.—Termination of War.

The great object of war is a satisfactory peace. There are three general ways by which a war may be terminated and peace secured.

First, by a cessation of hostilities and the subsequent recognition or reestablishment of peaceful relations between the belligerents.

Second, by a complete and unconditional submission on the part of one of the belligerents, which may be followed by an absorption of part or the whole of its territory.

Third, by the completion of a formal treaty of peace.

The termination of war by the first way is rare. The war between Sweden and Poland ceased in this way in 1716, and the war between Spain and its American colonies ended in somewhat the same way. In this latter case hostilities had ceased by the year 1825, and it was not until 1840 that intercourse with them had generally begun on the part of Spain. The independence of Venezuela was not recognized until 1850. Later instances are the cases of the war between Chile and Spain, which actually was of short duration, but which had a nominal existence of fifteen years, and the war between France and Mexico, which may be said to have ended in 1867, though the diplomatic relations between the two countries were not reestablished until 1881.

The disadvantages of this state of affairs, both to belligerents and neutrals, are evident. As the war fades away it is difficult to define its actual termination and the rights and obligations of everybody concerned are in doubt and uncertainty, while the issues which led to the war remain unsettled and may lead in the future to fresh hostilities.

As to the unconditional submission of one belligerent to another, with its consequent extinction or partition, there are many cases in both ancient and modern history. The wars of the French Revolution and Empire, and the later wars in which Poland and some of the German principalities were absorbed by other States, give examples of this sort.

Geffcken says that, in order to constitute the proper title, the intention and the fact of domination should coincide. The intention is made known by a declaration of incorporation; the fact is shown by the complete inability on the part of the subjected State to oust the power of the other.

Phillimore says as to this way of terminating war:

> The most unconditional submission would be holden, according to the principle of international law, to imply a retention of the common rights of humanity and between Christian States of Christian humanity. Any infringement of these rights would be beyond the moral competence of the conqueror.

The third method mentioned of terminating war is by a formal treaty of peace. The importance of a treaty of this kind requires an application of all the rules and customs relative to treaties in general, and nothing should be neglected to add weight and dignity to such an agreement.

A treaty of peace has been especially defined as an act by which the belligerent governments, taking into consideration the state of their forces, and the results of the war, determine their respective pretensions and convert them into rights and obligations.* Such treaties terminating great wars mark epochs in the world's history.

Treaties of peace are valid whether made with the authority which declared the war or with a de facto or established government succeeding it. They are obligatory even if made under the stress of military coercion, unless personal violence has been exercised upon the ruler or his representatives. A treaty of peace made with a ruler is not binding upon a nation when he is a prisoner or captive.

A formal treaty of peace is often preceded by a conference which arranges the preliminaries of peace. As these preliminaries, which are afterwards developed into a regular treaty, contain the essential conditions upon which peace is established, they should be faithfully adhered to in the final treaty.

The preliminaries of Villefranca led to the treaty of Zurich in 1859, and the preliminaries of Versailles led to the treaty of Frankfort in 1871.

The protocol of August 12, 1898, provided for the necessary preliminaries of peace between the United States and Spain. After it had been duly signed a proclamation was issued by the President of the United States, giving notice, in accordance therewith, of the general suspension of hostilities between the two countries.

The Constitution of the United States, in vesting in the President, by and with the advice and consent of the Senate, the authority to make treaties, constitutes him, with that body, the peace-making

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* Guelle. p. 214.

power of the Republic so far as foreign nations are concerned. Under the circumstances of his position he generally takes the initiative, though Congress can compel him to act by refusing the means of carrying on war.

Says Wheaton:

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself. But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it is known can not be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty; and in order to avoid disputes respecting the consequences of such acts it is usual to provide in the treaty itself the periods at which hostilities are to cease in different places. * * * When a place or a country is exempted from hostilities by articles of peace it is the duty of the State to give its subjects timely notice of the fact, and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrongdoer who is made responsible to the injured party and not the superior commanding officer of the fleet, unless he be on the spot and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrongdoer, after a lapse of a great length of time.

In a civil war which results in the suppression of a rebellion the termination is fixed by some public act of the political department of the Government. In the case of our civil war the President's proclamation declaring the war had closed marked its determination. As the proclamations included different States at different times it was ruled by the Supreme Court of the United States that the war did not close at the same time in all the States.

As soon as peace is established all acts should be stopped which belong only to times of war.

The general effect is, as Hall says—

To replace the belligerent countries in their normal relation to each other. The state of peace is set up, and they enter at once into all the rights and are bound by all the duties which are implied in that relation. It necessarily follows that, as soon as peace is concluded, all acts must cease which are permitted only in time of war. Thus, if an army is in occupation of hostile territory when peace is made, not only can it levy no more contributions or requisitions during such times as may elapse before it evacuates the country, but it can not demand arrears of those of which the payment has been already ordered. It is obviously not an exception to this rule that an enemy may be authorized by the treaty of peace itself to do certain acts which, apart from agreement, would be acts of war; such as to remain in occupation of territory until specific stipulations have been fulfilled, or to levy contributions and requisitions if the subsistence of the troops in occupation is not provided for by the government of the occupied district. A State may, of course, always contract itself out of its common-law rights. It can also hardly be said to be an exception that although prisoners of war acquire a right to their freedom by the simple fact of the conclusion of peace, it is not necessary that their actual liberation shall instantaneously take place; their return to their own country may be subordinated to such rules, and they may be so far kept under military surveillance, as may be dictated by reasonable precaution against misconduct or even by reasonable regard for the convenience of the State by which they have been captured.

As to the larger questions settled, Wheaton says:

The effect of a treaty of peace is to put an end to the war and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war by resuming hostilities for the original cause which first kindled it or for whatever may have occurred in the course of it. But the reciprocal stipulations of perpetual peace and amnesty between parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates, and it is perpetual in the sense that the war can not be revived for the same cause. This will not, however, preclude the right to claim and resist if the grievances which

originally kindled the war be repeated, for that would furnish a new injury and a new cause of war equally just with the former.

If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows that all previous complaints and injury arising under such claim are thrown into oblivion by the amnesty necessarily implied if not expressed, but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition it remains open for future discussion. And even a specific arrangement of the matter in dispute, if it be special and limited, has reference only to that mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding forever the assertion of the claim in any mode.

A naval or military commander is not obliged to accept any information as to peace which is not duly authenticated by his own government. The consequences of suspending hostilities upon false news may be very serious.

The restoration of peace carries with it the revival of certain private as well as public rights and obligations. Performance of acts rendered impossible by the war can not, however, be claimed. A man can not be required, for instance, to sell a house or live stock destroyed by war, and a period named for the fulfillment of obligations does not include the time of war.

All hostile acts connected with the war committed by individuals are protected after the conclusion of peace from all civil or criminal process. This, however, does not extend to suits brought, or ransom bills, or debts contracted by prisoners of war, or to cases of ordinary crimes committed by prisoners of war or by soldiers.

Acts of war done after the conclusion of peace or after the receipt of the official notice of the termination of hostilities are null and void, and they must be undone or compensated. Territory which has been captured must be given up, ships taken must be restored, damage from bombardment or loss of market compensated.

In regard to maritime prizes at the termination of war, Calvo considers that ships and cargoes condemned by prize courts before the peace should not be returned, nor give rise to claims of indemnity; but those not condemned at the conclusion of the war should be returned, or their value paid. A stipulation to that effect is found in the treaty of Frankfort, which closed the Franco-German war in 1871.

Section 55.—Postliminium; uti Possidetis; Conquest and Cession.

The jus postliminii in international law is derived from the fiction of similar title in the Roman law by which persons and, to a less extent, things captured by an enemy were restored to their original legal status when again coming under the power of the nation to which they formerly belonged.

The right of postliminium, so far as international law is concerned, can be said to deal no longer with the restoration of persons, but refers now to the restoration of things, and less to movable things than to real property and territory.

This right is incident to a state of war and belongs exclusively to war. Its tendency is to mitigate the evils of war, as the rule of postliminium requires that property captured by the enemy and recaptured by the fellow-subjects or friends of the original owner does not become the property of the recaptor, but is to be restored upon certain conditions to the original owner. Says Phillimore:

With respect to immovable property captured in war, the established doctrine of international law may now be said to be that the acquisition of it is not holden

to be completed before (1) either the territory in which it is situated has by submission, and consequent extinction of its national personality, become incorporated in the possession of the conqueror; or (2), what is a much safer title to the property so acquired, before a treaty of peace has recognized and ratified the possession of the conqueror.

Says Halleck:

Towns, provinces, and territories which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminium, and the original sovereign owner on recovering is bound to restore them to their former state. In other words, he acquires no new rights over them either by the act of recapture or restoration. * * * But if the conquered provinces and places are confirmed to the capturer by the treaty of peace, or otherwise, they can claim no right of postliminium. * * * A subsequent restoration of such territory to its former sovereign is regarded in law as a retrocession and carries with it no rights of postliminium. * * *

But if the subjugated State is delivered by the assistance of another the question of postliminium may arise between the restored State and its deliverer. There are two cases to be considered: First, where the deliverance is effected by an ally, and second, where it is effected by a friendly power unallied. In either case the State so delivered is entitled to the right of postliminium. If the deliverance be effected by an ally the duty of restoration is strict and precise, for an ally can claim no right of war against a co-ally. If the deliverance be effected by a State unallied, but not hostile, the reestablishment of the rescued nation in its former rights is certainly the moral duty of the deliverer.

There are certain acts done by the invader that must remain good notwithstanding the right of postliminium. Judicial, administrative, and municipal acts, not of a political or military nature, remain good, or otherwise the whole social life of the community would be disorganized. The payment of taxes to the de facto government must be recognized, as well as sentences passed upon ordinary criminals; but any punishment for acts directed against the security or control of the invader becomes null and void. While innocent acts done by the invader remain, and the legitimate sovereign can not take steps that are retroactive, all administrative acts of the invader concerning the resources of the State become inoperative from the time of the restoration of the legitimate government. Hall says:

When an invader exceeds his legal powers, when for example he alienates the domain of the State or the landed property of the sovereign, his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest and supposes himself to have succeeded. Whether, therefore, they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.

The acts of the invader that have a political aim, or that change the constitution of the State, cease to be of effect upon the restoration of the legitimate government.

It is no more than just and equitable, however, if the people of a country relieve themselves of the rule of the invader without the assistance of the former government or its allies, that this government should not recover its rights except by the consent of the people. As Bluntschli says, the expulsion of the enemies by the people themselves demonstrates the strength of the nation and the weakness of the government.

Conquest, as distinguished from military occupation, may be defined as that status which a territory taken from an enemy attains when it passes definitely into the hands of the conqueror.

The title, by conquest, of territory may be completed in several ways: By treaty of peace or cession, by subjugation and decree of incorporation and the consent of the inhabitants, or by the inability

of the former government to regain control after a sufficiently long period of time has elapsed. Says Halleck:

> In whatever way the conquest is completed, the institutions of the conquering power usually require some definitive act in order to annex or incorporate the conquered territory so as to complete the conquest and perfect the title. In such cases no alienation to a third party can be made complete till the conquest itself is perfected by such definitive act. Thus the President of the United States, when war is duly declared, may conquer and take possession of foreign territory, but the joint action of the President and the Senate is required to complete it by treaty, and Congress alone can annex it or incorporate it into the Union. Without such act of treaty confirmation or of lawful annexation or incorporation the title to any conquest made by the United States would still be considered in international law as incomplete.

By the principle of uti possidetis which, unless otherwise stipulated, is inherent with all treaties of peace, all property captured during the war is conceded to the possessor. Hence, unless otherwise arranged, all conquered territory remains with the conqueror, and the establishment of peace gives a title so far as other countries are concerned.

Hall mentions that the effects of a conquest are to legalize acts done in excess of the rights of a military occupant between the time of the declaration to conquer and its completion, and also to invest the conquering State with all the rights of property and sovereignty and, of course, the corresponding obligations.

It has been, however, usual, as he states, in modern times, to give liberty to inhabitants of a ceded territory to keep their original nationality by withdrawing from the ceded district. As a rule this choice is with the condition that they shall withdraw within a certain period. In the treaty providing for the cession of Alsace and Lorraine those retaining French nationality, though compelled to emigrate, were allowed to retain their landed property in the ceded territory.

It seems well established that, on the conquest or cession of a conquered territory, the laws of the country acquired, especially the municipal laws and usages, remain in force until they are altered by the conqueror or so far as they are not changed by the political institutions of the new sovereignty. This applies to peaceful acquisition as well as conquest, and we have an example in our own history in the retention of the civil law by the State of Louisiana.

The conqueror upon the completion of his conquest acquires all the rights of the original State, such as titles to real estate, movables, and such incorporeal property as debts.

PART III.

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS.

Chapter IX.

Rights and Duties of Neutrals.

Section 56.—Neutrality; Notification at Outbreak of War.

Discussing the general attitude of neutrality, Wheaton says:

> The right of every independent State to remain at peace whilst other States are engaged in war is an incontestable attribute of sovereignty. It is, however, obviously impossible that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties and consequently not at liberty to favor one party to the detriment of the other.

State neutrality may be then defined as the position occupied by those countries which, in time of war, do not take part therein, but continue friendly relations and proper intercourse with the belligerents.

There is also a neutrality by treaty or convention, which is required by a special compact or convention from permanently neutralized States, such as Switzerland and Belgium.

As a result of experience, the rules of international law have assigned to the condition of neutrality certain rights and obligations which exist only with a state of war. Limitations, for instance, are placed upon the use of neutral ports by belligerent cruisers; some supplies are denied to them while others are given in a sparing manner. The neutral government, on one hand, enforces respect for the neutrality of its waters and territory, while, on the other hand, certain trade of citizens or subjects becomes liable to confiscation from the belligerent who suffers by its continuance. Every restriction, however, upon the rights of a neutral or belligerent must have a clear and undoubted rule and reason. The burden of proof lies upon the restraining government.

In discussing the progress of the law of neutrality, Thomas J. Lawrence, in a recent work, says:

> The law of neutrality is a comparatively modern growth, in so far as it deals with the mutual rights and duties of belligerents and neutral States. It has arisen during the last three centuries from a recognition, dim at first, but growing clearer as time went on, of the two principles of absolute impartiality on the part of belligerents. But in so far as it deals with the right of belligerent States to put restraint on the commerce of neutral individuals it is at least as old as the maritime codes of the middle ages, and in some of its provisions traces can be found of

the sea laws of the Greeks and Romans. Opposing self-interest are the operative forces which have determined the character of this part of the law of neutrality. At first the powers at war were able to impose hard conditions upon peaceful merchants. It was a favor for them to be allowed to trade at all, and they were not permitted to do anything that would impede the operations of the belligerents. Then, as commerce became stronger, concession after concession was won for neutral traders, and neutral States made common cause to protect their subjects from molestations they deemed unwarrantable.

It has been generally conceded that the permanent and definite improvement in the rights of neutrals was due more to the policy and advocacy of the United States from 1793 onward than to any other one cause.

When war breaks out between two States, there is no obligation on the part of other States to issue a proclamation of neutrality; but since the beginning of the nineteenth century it has become customary to do so when a State has commercial interests which may be affected, or in case its ports are likely to be entered by belligerent cruisers.

This practice has several advantages, at least two of them being of considerable importance. In the first place, it calls the attention of its subjects or citizens to the neutrality or foreign enlistment act; and, secondly, in recent years it proclaims the policy of the neutral government toward the belligerents, particularly as to entry and use of its ports and waters by belligerent cruisers.

Good examples of proclamations of this kind are found in those issued by President Grant at the outbreak of the Franco-German war; the first dated August 22, 1870, and the second October 8 of the same year. The latter treated of the entry and use of ports of the United States, and laid down strict rules, which had become necessary from the previous experience of the United States both as a belligerent and as a neutral State. These rules will probably be promulgated in similar cases in future, as they seem to embody the settled policy of the United States.

At the outbreak of the war with Spain (1898) practically all of the civilized nations of the world, as well as China, Japan, and Korea, issued proclamations or declarations of neutrality. This included also, in many cases, declarations from their various colonies and dependencies. These declarations varied greatly in form and substance, from one of generalities, like France and Belgium, to statements in much detail, as the case of Great Britain and Brazil.

Section 57.—Belligerent Acts Not Permissible in Neutral Territory.

The rights of neutrals can be placed under two general heads: (1) That of inviolability of territory. No hostile act should take place within the territory of a neutral, and all of its sovereign rights with regard to its territory should be fully respected. (2) That in all matters of trade, commerce, residence, navigation, etc., the treatment of the citizens or subjects of a neutral State when brought in contact with the belligerents should be in strict accordance with treaty obligations and the rules and usages of international law.

The subjects grouped under the second head will be more properly discussed hereafter in connection with contraband of war, blockade, the right of search, etc.

Concerning the rights of neutral States referred to under the first head, these rights are now mainly connected with the transit of troops, the use of neutral waters as a hostile base of supplies and operations, of hostile acts toward vessels in neutral territory.

So far as the passage of troops of either belligerent across neutral territory is concerned, the neutral State has not only the right, but also the manifest duty of preventing this violation of its territory; no matter if it is attempted by one or both belligerents. The act of transit of troops in war times is a hostile measure, and if permitted would destroy the neutral character of the State permitting it. How indirect measures of this kind may be used by a belligerent to forward hostile movements is illustrated by the attempt made by Germany in 1870 to secure a transit across Belgium.

After the battle of Sedan the German army was so embarrassed by wounded troops that it applied to Belgium for permission to transport the wounded across that country by railway. In this way the route open into Germany could be used for military purposes alone, and the German commissariat in France relieved from the task of feeding the wounded in addition to supplying the active forces. Belgium, after consultation with the English Government, refused the request. Hall says:

> It is indeed difficult to see, apart from the grant of direct aid or of permission to move a corps d'armée from the Rhine provinces into France, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railway from Nancy to the frontier from incumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access.

During the Franco-Prussian war in 1870 about 60,000 French troops crossed into Swiss territory for safety. They were at once disarmed and interned by order of the Swiss Government. The sick and wounded were retained in Switzerland and the arms of the troops were held as security for the repayment of the cost of subsistence.

Before this event the same country, in the same war, denied a passage through its territory to bodies of Alsatian recruits bound for France. In this latter case the recruits, though enlisted for the French army, were traveling without arms or uniforms.

When a belligerent uses neutral ports and waters as a base for hostile operations and supplies, as a point to watch the other belligerent, or as an original starting point for hostile expeditions, the sovereignty of the neutral State is constructively if not actually violated. These acts may not involve the use of force, but they place the neutral in the position of aiding and assisting one belligerent by affording him the use of neutral territory in a manner to give him opportunities for hostile acts against the other belligerent. The use of territory in this way provides a base for a belligerent, a base being in a military sense a place where resources and reenforcements can be obtained, from which a force may proceed to take the offensive against the enemy, and in which it finds refuge and protection at need. The essential value of such a base as afforded by a neutral port in modern naval warfare can readily be comprehended.

Nor is it necessary that the ports should be habitually used. Melbourne formed a sufficiently good base to the Confederate cruiser *Shenandoah* during our civil war to enable her after a single stay to carry on a campaign in the North Pacific Ocean against our mercantile and whaling vessels without being obliged to resort to any other port.

A neutral, hence, has the right to impose such restrictions upon belligerent vessels which come within its jurisdiction as may be deemed necessary for the enforcement of its neutrality, and so long as these restrictions are impartially carried out there is no ground for complaint. This right is exercised at times to the extent of forbidding all

armed cruisers, with or without prizes, to enter certain neutral ports and waters for the purpose of obtaining provisions, coal, or repairs.

In 1854 Austria closed the port of Cattaro to belligerent vessels of war. Great Britain did the same as to the ports and anchorages of the Bahamas during our civil war, while Sweden more than once has closed its five military ports to the cruisers of belligerent nations.

The restrictions and prohibitions imposed by neutrals upon the vessels of belligerents as to the use of neutral ports are never extended so far as to deny the hospitality of those ports in case of immediate danger or want, such as stress of weather, want of provisions, etc. Asylum to this extent is required by the ordinary laws of humanity.

By the first proclamation of President Grant, issued August 20, 1870, at the outbreak of the Franco-Prussian war, among the acts forbidden were those of increasing or augmenting the force, armament, or warlike equipment of any belligerent vessel of war within the territory of the United States, also the beginning or setting on foot, or providing or preparing means for any military expedition against the territory of either belligerent.

The movements of the belligerent cruisers on our coast and in our waters being such as to call for more explicit and stringent rules, President Grant on the 8th of October, 1870, issued a second proclamation, by which the belligerent ships were not permitted to frequent the waters of the United States for the purpose of preparing for hostile operations, or as ports of observation upon the ships of the other belligerent, and they were forbidden to leave the waters of the United States, from which a vessel of war, privateer, or merchant vessel of the other belligerent had sailed, until after the expiration of twenty-four hours from its departure. Belligerent vessels were not to use the ports of the United States except in case of necessity, and they were to leave port twenty-four hours after provisions had been secured or the necessary repairs effected. No supplies other than those necessary for the subsistence of the persons on board were to be taken, and only sufficient coal to take the vessel to the nearest European port of her own country, and until her return to such port no coal was to be supplied oftener than once in three months.

Belligerent ships of war, generally, entering ports of the United States were to remain but twenty-four hours, except in case of stress of weather, or for provisioning, or repairs.

In the proclamation of neutrality made by Great Britain, April 26, 1898, during our war with Spain, it was directed that the three rules embodied in the treaty of Washington, of 1871, concerning the duties of a neutral government should be observed, and attention was also called to the foreign-enlistment act. Instructions were also issued to the various departments of the Government prescribing practically the same rules as to the movement of the belligerent cruisers as were contained in the proclamations of President Grant, referred to above.

The final article or rule of the instructions accompanying the proclamation of neutrality of Great Britain, however, interdicted armed ships of either belligerents from carrying prizes into British waters or the waters of any British colony or possession.

In the case of the *Twee Gerbroeders*, captured by an expedition from the British vessel *Espiegle*, then lying at anchor in neutral waters, Sir William Scott laid down a general principle as follows:

> An act of hostility is not to take its commencement on neutral ground. It is not sufficient to say it is not completed there: you are not to take any measure there that shall lead to immediate violence: you are not to avail yourself of a station on

neutral territory, making as it were a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage.

Opinions vary as to the proper definition of a hostile expedition. Says Walker:

Such an expedition in general consists of an armed and organized body of men about to depart the soil in pursuance of a present design to carry on hostilities in the immediate future against a particular government. But the absence of a single feature may change the character of the entire proceeding. In 1870 a body of 1,200 Frenchmen left New York to join the armies of their native land in her struggle against the Prussians, and the vessels which conveyed them also carried a large consignment of rifles and ammunition for the use of the French troops; but, these men being a mere disorganized force, their departure from American soil, it is universally acknowledged, in no way reflected upon the neutral intentions of the United States Government. On the other hand, the elements of an expedition may be recognized in a seemingly less dangerous proceeding.

The British ministers, for example, however open to criticism, may have been their method of action, were well advised when in 1827 they conceived it to be their duty to prevent the landing in Terceira of Count Saldanha and his followers, although the members of the party left Plymouth entirely unarmed.

The question of hostile acts within neutral territory is largely one connected with the attacks upon or capture of belligerent ships in neutral waters. It is not only the right of the neutral to prevent this capture or attack, but also his duty; and if necessary the neutral should resort to force to defend the attacked belligerent and to punish the offender. It is a well-established rule of international law that if a ship should be captured under such circumstances it is the duty of the neutral State whose territory is violated to effect restitution if possible, and secure redress for the injured belligerent. Walker says:

As between a belligerent and his enemy a capture made within neutral waters is good prize. As between the captor and the neutral state, however, the capture imports an offense against the jurisdiction of the neutral government, and as between the neutral government and the captive, that government it behooves, whether spontaneously or on the instigation of the injured shipowner, to address prompt complaints to the government of the wrongdoer, or otherwise to grant redress for the wrong, an obligation which only, perhaps, ceases when the vessel attacked within the neutral zone attempts to shift for herself and to repress force by force. Should a captor or his agent be bold enough to bring his prize at a subsequent period into a port of the neutral government, that government may vindicate its offended jurisdiction by seizing property and liberating prisoners taken in violation of its protectorate.

In the case of the *Anna*, captured by a British privateer in 1805 near the mouth of the Mississippi River, the British Court of Admiralty not only restored the captured property, as having been taken within neutral territory, but fully asserted the sanctity of such territory from belligerent operations. In this case it was decided by Sir William Scott that territorial waters extend three miles, not only from the shore line, but from islands off the coast, no matter what their nature may be. This claim was made under the direction of the American minister as representing the neutral power wronged.

In the case of the privateer *General Armstrong*, destroyed by British vessels of war in the harbor of Fayal in 1814, a claim was made by the United States against the Portuguese Government for permitting a violation of the neutrality of the port by the British squadron. After a long controversy the matter was referred to the President of the French Republic in 1851, who decided that where a capture has been made in neutral waters a claim for damages by the injured belligerent against the neutral State is not allowed if the captured ship resisted instead of asking protection of the neutral. It is doubtful, notwithstanding this decision, whether it can be held to be established as a

precedent that simple resistance to an attack on a ship and omission of formal application for protection from the neutral sovereign release that sovereign from his duty or the offending belligerent from the responsibility of the violation of neutral territory.[1]

Halleck says.

> If a neutral State neglects to make restitution and to enforce the sanctity of its territory, but tamely submits to the outrages of one of the belligerents, it forfeits the immunities of its neutral character with respect to the other and may be treated by it as an enemy.

The French courts have also decided in the case of the *Perle* that a capture in neutral waters is illegal, whether made under the guns of a fort or simply on an undefended coast, and the vessel, at the instance of the Spanish ambassador, who represented the neutral sovereign, was restored.

In the case of the British ship *Anne* it was decided by the Supreme Court of the United States in 1818 that if the captured ship first commenced hostilities in neutral waters she thereby forfeited neutral protection. In the same decision Judge Story delivered the opinion that a capture made in neutral waters is, as between enemies, deemed, to all intent and purposes, a legal capture. The neutral sovereign alone can call its validity in question. This latter principle has been repeatedly affirmed by courts in other cases, the infringement of the rights of the neutral sovereign being the only ground of the invalidity of such captures.

In 1864 the Confederate cruiser *Florida* was seized in the harbor of Bahia, Brazil, by the U. S. S. *Wachusett.* The Brazilian Government at once demanded full reparation from the Government of the United States for this indignity and violation of its sovereignty. The United States expressed its regrets, dismissed the consul who had been concerned in the affair, tried the commanding officer of the *Wachusett* by court-martial, surrendered the crew of the *Florida*, and saluted the flag of Brazil in the bay of Bahia. The Government of the United States was unable to surrender the *Florida*, as she had been sunk in a collision in Hampton Roads. Says Halleck:

> If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed to result in any inconvenience to the neutral power.

Hall goes so far as to say that not only should property captured in violation of neutrality be seized upon entering the neutral's jurisdiction, but, as a State has the right of pursuing vessels into the open sea and arresting them there for violations of the municipal law directed only against itself, the neutral State should have the right to vindicate its sovereignty and neutral duties in the same manner. This seems reasonable if the pursuit is made under the conditions of the pursuit and seizure for violations of municipal laws—that is, at the time or immediately after the act has occurred.[2]

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[1] Dana says, as to this affair, that "the principle of the decision must certainly be confined to cases where the vessel attacked has reason to believe that effectual protection can be seasonably afforded by the neutral, and makes a fair choice to take the chances of a combat rather than appeal to neutral protection."

[2] Wheaton doubts whether vessels condemned by prize courts after capture in neutral territory would be restored by a neutral if they came again within its jurisdiction; but Ortolan seems to have justice with him when he states that the sovereign rights of a nation can not be put aside by a foreign tribunal, and hence such a decision is not binding so far as it is concerned.

When a ship captured in neutral waters becomes transformed into a man-of-war by the belligerent captor, most writers seem to agree that a reentry into the neutral's port does not subject it to seizure, as it has become invested with the immunities of a vessel of war. There is no question, however, that such vessels can and should be denied the right to visit again the ports of a neutral whose territory has been violated. Brazil adopted a practice somewhat of this nature during our civil war.

In regard to affording refuge and hospitality in neutral ports to prizes captured outside of neutral territory, it may be considered that the best usage, unless it is otherwise provided by treaty stipulation, forbids belligerents to bring prizes into neutral ports except in case of stress of weather, danger, or want of supplies necessary to their navigability, and then the stay should be only so long as their necessities require. On no account should the sale of prizes be permitted in neutral ports. During our civil war and our war with Spain, Great Britain forbade the armed ships of both belligerents to carry their prizes into any British port.

The rule that when hostile ships meet in a neutral harbor the authorities of the port may prevent one ship from sailing until after an interval of twenty-four hours has elapsed from the sailing of the other is becoming a general one, and will probably be enforced in all future maritime wars.

A further extension of this rule was made in 1861 by Great Britain on account of the incident of the U. S. S. *Tuscarora* and the Confederate cruiser *Nashville*, at Southampton, England.

The *Tuscarora* had arrived in Southampton water in the latter part of 1861, the *Nashville* being then in dock. By keeping up steam and having a slip rope on her cable, so that the moment the *Nashville* got underway the *Tuscarora* could slip and precede her and claim priority of sailing, and by returning again within twenty-four hours, and by notifying and then postponing her own departure, the *Tuscarora* was able virtually to blockade the *Nashville* within British waters for some time.

In order to guard against a repetition of such acts the British authorities directed that in the future during the war any vessel of either belligerent entering an English port should "be required to depart and put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew or repairs;" in such case the local authorities were to "require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." This rule is virtually the same as that incorporated in the proclamation of President Grant in 1870.

Section 58.—Equipment of Vessels of War in Neutral Territory.

The neutrality and foreign-enlistment acts of the various maritime States are those that cover such matters as the construction and equipment in neutral territory of vessels that may be used for belligerent purposes against any other State.

On account of our geographical position and our policy of abstaining from interference in European quarrels the Government of the United States has been under the necessity of enforcing these neutrality regulations to a greater extent than that of most other countries. Our stand of neutrality during the wars which involved all Europe

during the latter half of the eighteenth and the beginning of the nineteenth century, and our proximity to the Latin-American States and colonies, with the constant wars and insurrections with which they were concerned, led to the enactment of the neutrality laws of 1794 and 1818, as well as to the existence of most of the cases which have arisen under them.

By the act of 1794, revised in 1818, and now sections 5283 and 5285 of Revised Statutes of the United States, it is declared to be a high misdemeanor, punishable by fine and imprisonment, for anyone to fit out and arm, or to increase and augment the force of any armed vessel, with the intent that such vessel be employed in the service of any foreign prince, State, colony, district, or people at war with another State, colony, district, or people with whom the United States are at peace; or to begin, set on foot, or provide or prepare the means for any military expedition or enterprise against the territory of any foreign prince, etc., with whom we are at peace. Any vessel or vessels fitted out for such purpose are made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or by treaty ought not to remain within the United States, and to employ the public force generally in compelling the observance of the duties of neutrality prescribed by law.

As a result of the controversy concerning the construction and fitting out of the *Alabama* and other Confederate cruisers, which afterwards resulted in the Treaty of Washington and the Geneva Tribunal of Arbitration, Great Britain enacted the foreign-enlistment act of 1870, section 8 of which provides:

> If any person within the dominions of Her Majesty builds or agrees to build, or issues or delivers any commission for any ship, or equips, dispatches, or causes or allows to be dispatched any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State, such person shall be deemed to have committed an offense against this act.

The regulations that govern the French Republic are simpler and are in accord with the usage of the continental European nations. They are included in articles 84 and 85 of the French penal code, and provide briefly that whosoever shall expose the State to a declaration of war by hostile acts not approved by the Government will be punished by banishment. Reprisals attempted without the approval of the Government are subject to the same penalty.

Similar provisions are found in the penal codes of Italy, Portugal, Brazil, Spain, Russia, and the Netherlands.

One of the most important cases that have occurred under the neutrality acts of the United States is that of the *Santissima Trinidad*, in 1822, upon which a decision was rendered by the Supreme Court of the United States. The opinion was delivered by Mr. Justice Story, of that court, and very much from this opinion was quoted in support of the case of Great Britain before the Geneva Tribunal.

The *Santissima Trinidad* was a Spanish ship captured on the high seas by two small armed vessels originally fitted out in the United States, but sold at Buenos Ayres to the government of that State. At a subsequent period one of these vessels had her crew substantially increased in the United States. The cargo of the *Santissima Trinidad* was libeled by the Spanish consul at Norfolk, who claimed restitution.

The judgment of the court was that citizens of a neutral State may

send armed vessels to belligerent ports for sale, provided it be done as a bona fide commercial transaction, a ship in this situation being considered as merely an article of contraband of war.

The augmentation of the force of a belligerent cruiser in neutral territory was held to be illegal, and entailed the restoration of a prize made by such vessel if brought within the jurisdiction of the offended neutral.

The best comment upon this case and statement of its relation to the neutrality position of the United States up to the time of the treaty of Washington and its three rules and results at Geneva may be found in the following extracts from the summary in Mr. Dana's note 215, in the eighth edition of Wheaton. They are as follows:

As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations, or the extent to which they may have gone, and although his attempt may have resulted in no definite progress toward the completion of his preparations. The procuring of materials to be used knowingly and with the intent, etc., is an offense. Accordingly it is not necessary to show that the vessel was armed, or was in any way or at any time, before or after the act charged, in a condition to commit acts of hostility. * * *

It will be seen at once, by these abstract definitions, that our rules do not interfere with bona fide commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case the extent and character of the equipments are as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case the ship is merchandise, under bona fide neutral flag and papers, with a port of destination, subject to search and capture as contraband merchandise by the other belligerent, to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation, if she does any act of hostility to the property of a belligerent, as much as if she did it to that of a neutral. Such a trade in contraband a belligerent may cut off by cruising the seas and blockading his enemy's ports. But to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral; and, to do that effectually, he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for.

The cases of the *Alabama* and other cruisers, which gave rise to the treaty of Washington, may be found with sufficient fullness in Snow's Cases and Opinions, or exhaustively in the volumes which contain the papers relating to the treaty of Washington of 1871.

Article VI of that treaty provided for an arbitration to determine British liability for these depredations, the tribunal to be governed by the following three rules, and also by such principles of international law not inconsistent therewith as the arbitrators should determine to have been applicable to the case. The rules are:

A neutral government is bound—

First—To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is

intended to cruise or carry on war with a power with which it is at peace, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike uses.

Secondly—Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly—To exercise due vigilance in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Of these rules Calvo says, in the Revue de Droit International, that they are not new in principle, having been previously embodied in the practice and laws of most countries; that they were but the affirmation of preexisting principles, sanctioned since long time by numerous facts and by the legislation and practice of nations.

Among other publicists Bluntschli, Rolin-Jacquemyns, Esperson, Pradier-Fodéré, Geffcken, Fiore, Pierantoni, Kusserow, Caleb Cushing, and Bancroft Davis not only approve the three rules, but affirm that the claims of the United States were justified by the general principles of international law independently of these rules.

The members of the Institut de Droit International in their session at Geneva in 1874 took into consideration these rules and pronounced an opinion that although the three rules in point of form were open to objection, in substance they were the clear application of a recognized principle of the law of nations.[1]

Prof. E. Robertson, in an article upon international law in the Encyclopedia Britannica, says:

These rules, which we believe to be substantially just, have been unduly discredited in England, partly by the result of the arbitration, partly by the fact that they were, from the point of view of English opinions, ex post facto rules, and that the words defining liability (due vigilance) are vague and open to unforeseen constructions; for example, the construction actually adopted by the Geneva Tribunal, "that due vigilance should be exercised in proportion to the belligerent's risk of suffering from any failure of the neutral to fulfill his obligations."

The qualifying clause inserted at the request of the British Government in the treaty of Washington and the clause as to the future binding effect of the treaty with respect to the rules read as follows:

Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government can not assent to the foregoing rules as a statement of principles of international law which were in force when the claims mentioned in Article I arose; but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of these claims the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

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[1] In 1875, by a majority vote of those in attendance, the Institut adopted the following as an expression of opinion upon the subject:

"L'État neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.

"En conséquence, l'État neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des États belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseau de transport militaire, non plus que le matériel de ses arsenaux ou de ses magasins militaires, en vue de l'aider à poursuivre la guerre. En outre, l'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa jurisdiction."

And the high contracting parties agree to observe these rules as between themselves in the future, and bring them to the knowledge of other maritime powers, and to invite them to accede to them.

As previously stated, in the proclamation of neutrality issued by Great Britain at the outbreak of our war with Spain it is stated that—

Whereas we are resolved to insure by every lawful means in our power the due observance by our subjects, toward both the aforesaid powers, of the rules embodied in Article VI of the treaty of the 8th of May, 1871, between us and the United States of America, which said rules are as follows. * * *

Acceptance of the general principles of these rules does not, of course, imply acceptance of the interpretations given them by the arbitrators at Geneva. Conflicting opinions concerning these latter matters have been expressed both by writers upon international law and by English and American statesmen.

The British foreign-enlistment laws are not only superior in efficiency to our existing statutes, revised in 1818, but are probably the best expression of the principles and of the "due diligence" required by the treaty of Washington borne upon the statute books of any nation.

The changes made by the introduction of steam, with a constantly quickening speed of ships, and the increase in size, cost, and time required for the construction of modern vessels of war, especially armored vessels, have caused a revolution in naval construction and equipment, as well as in the conditions of naval warfare.

The effect of these new conditions must not be ignored in the questions under discussion. By these changes in conditions the value of a single vessel, if armored and armed in accordance with the latest improvements, is so great as to place it on a plane entirely different from that occupied by sailing and other vessels, whose equipment and construction by neutrals form the subject of most of the cases quoted in treatises upon international law.

The possession of modern seagoing armored vessels by either belligerent may easily have a decisive effect upon the issue of the struggle. The gravity of permitting the issue of a vessel of this kind from a neutral port was not exaggerated by Mr. Adams, our representative in London, in the case of the two armored rams built for the Confederate Government, though nominally for a French house, by the Messrs. Laird, at Liverpool.

On the 5th of September, 1863, Mr. Adams wrote to Earl Russell that one of these vessels was "on the point of departure from this kingdom on its hostile errand against the United States." He added, after a description of the warlike character and great power of these vessels, that "It would be superfluous in me to point out to your lordship that this is war."

It is well to observe that this great cost and elaborate construction of a modern fighting vessel render its building less and less probable as a matter of business speculation, and render also the intent of construction and of purchase more evident. Still, in view of the very serious consequences that may result from such acts upon the part of neutrals in these days, it seems beyond argument that quickened vigilance and an increased diligence on the part of the neutral State is more required in regard to the construction, equipment, and departure of vessels designed exclusively for purposes of war.

Considering, then, this state of affairs it may not be improbable that the prescription of the arbitrators at Geneva as to due diligence may

come to be accepted in the future as an approximation to the definition of the duty of a neutral. It reads as follows:

> And whereas the "due diligence" referred to in the first and third of said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part, etc.

As to fast steamers that are capable of being converted from merchant steamers into transports, depot vessels, supply steamers, commerce protectors, and commerce destroyers, for many reasons they stand upon a different basis from vessels designed and built for fighting purposes alone. Hall says of these:

> Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient caliber to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralyzing the whole shipbuilding and ship-selling trade of the neutral country.

Section 59.—Loans of Money and Sales of Munitions of War to Belligerents by Neutrals.

In discussing the questions of neutral rights and obligations, the distinction should be sharply drawn between neutral States and their subjects and citizens.

The neutral State is, as we have seen, under obligation toward the belligerents not to aid nor allow aid to either belligerent as against the other in or from its own territory.

But as between the belligerents and the neutral individual, no legal obligation can be said to exist. Each individual owes duty only to his own sovereign, and acts done by individuals to injure a belligerent are criminally wrong only so far as they compromise the State of the individual.

In return the belligerent State is under obligation only to other States, and its conduct toward the neutral individual is limited only by international agreements and by the accepted rules and usages of international law. Within these rules the belligerent State is at liberty to act toward the neutral individual as it may deem necessary for the prosecution of the war. Such action is, however, generally performed by means of a judicial system of its own, the penalities being prescribed as well as enforced by itself.

Loans of money to one of the belligerent States, made or guaranteed by a neutral State, are manifestly improper. They are direct aid, given by one of the most effective agencies of modern times.

But loans of money by neutral individuals are another matter; they are matters of business, of quid pro quo, and not a violation of State obligations toward a belligerent. Hall says of this question:

> A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money than because they are open for the purchase of cotton. The reason is obvious. Money is, in theory and in fact, an article of commerce in the fullest sense of the word. To throw upon neutral Governments the obligation of controlling dealings in it, taking place within their territories, would be to set up a solitary exception to the fundamental rule that States are not responsible for the commercial acts of their subjects. * * * Money is merchandise, the transmission of which would elude all supervision. Loans need not be handed over in specie: it is possible that payment might be made in bills, not one of which might enter the neutral country in which the contract is made, and if it were attempted to stop the practice by penalties

nothing could be more easy than for the real lenders to conceal themselves behind names borrowed in the country of the belligerent debtor.

During the Franco-German war both the French loans and part of the North German Confederation loan were issued in England. Mr. Webster, when Secretary of State, as far back as 1842 said:

As to advances and loans made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this as long as Texas is at peace with the United States, and that these are things which no Government undertakes to be responsible to restrain.

Woolsey says, also:

The private person, if the laws of his own State or some special treaty does not forbid, can lend money to the enemy of a State at peace with his own country or can enter into its service as a soldier without involving the government of his country in guilt.

As to the munitions of war, an application of the same rule seems logical. A sale of arms, directly or indirectly, by a State to one or even both of the belligerents seems to be a violation of neutral obligations. Says Hall:

The general principle that a mercantile act is not a violation of a State's neutrality is pressed too far when it is made to cover the sale of munitions or vessels of war by a State. Trade is not one of the common functions of a Government, and an extraordinary motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at a moment when their purchase is useful to a belligerent.

The case of the Swedish frigates, which is much quoted in this connection, is as follows: About 1825 the Swedish Government, wishing to reconstruct its navy, offered some of its older vessels for sale, first to Spain, then at war with its American colonies, and then to an open market. Three of the vessels were finally sold to a Stockholm mercantile house, which immediately sold them to an English house. As this latter house was known to be the agent of the Mexican Government, with whom Spain was engaged in hostilities, the Spanish chargé d'affaires protested against the transfer as an act of hostility. The Swedish Government replied that in the sale they had merely exercised an ordinary legal right, but afterwards when opportunity arose the contract was dissolved at some pecuniary loss to the Swedish Government, and the vessels were taken back.

In 1868 the Congress of the United States authorized the sale of the immense stock of munitions of war left on hand at the end of the civil war. During the Franco-Prussian war a large quantity of these munitions were sold under this act at open sale to Americans who afterwards proved to be agents for the French Government. The matter became a subject of investigation in the United States Senate, and the committee charged with the subject reported that the sale was made with no intention that these articles should go into the hands of either belligerent.[1]

As to sales of arms, etc., by individuals, etc., the following quotation from Jefferson gives both our present and past practice:

Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their existence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace does not require from them such an internal derangement in their occupation. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies.

[1] Snow's Cases, p. 459.

Chapter X.

Aid to Insurgents; Contraband of War.

Section 60.—Aid to Insurgents.

It has already been stated that while belligerent communities possess the rights of war, there is no obligation on the part of existing States to recognize the existence of such rights in insurgents.

Dana, in a note to Wheaton, speaking of the recognition of belligerency in an internal conflict, which must be accorded if a state of war exists, says, among other things:

> If it is a war, the rules and risks respecting carrying contraband, or dispatches, or military persons, come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents, in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while if it is not a war, they do not come into that category, but into the category of piracy or of crimes by municipal law.

The municipal laws of the United States, commonly known as the neutrality acts of 1794 and 1818, do not, however, draw any distinction in language between belligerents and insurgents. The criminal feature is the fitting out of a vessel with intent that such ship or vessel shall be employed in the service of any foreign prince, or State, or of any colony, district, or people, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince, State, etc.

Of the application of this act Attorney-General Hoar says, in an opinion delivered in 1869,[1] as follows:

> The neutrality act of 1818 is not restricted in its operation to cases of war between two nations, or where both parties to a contest have been recognized as belligerents; that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent State for use against a revolted colony whose independence has not in any manner been recognized by our Government.

Under this act of 1818, as thus construed, the policy of the executive has been a settled one with respect to insurgents. The greater part of the cases that have arisen have been in connection with the insurrections and disturbances in the Island of Cuba and in the Republics of Central and South America.

The formation of filibustering expeditions within the United States for insurrectionary purposes against other governments has been of sufficient frequency to call for many applications of our neutrality act.

The duty of the United States toward other countries with which they are at peace is a matter of international law, but the penal methods used to prevent individuals from using our territory in ways that are inconsistent with that duty belong to the domain of municipal law. It follows that neutrality acts may prohibit and punish many

[1] 13 Op., 177, Hoar, 169.

things which international law does not require neutral nations to prevent.

In discussing this phase of the subject, Secretary Bayard wrote, in 1886, to Mr. Hall, our minister to Central America, as follows:

> Breaches of neutrality may be viewed by this Government in two aspects: First, in relation to our particular statutes, and secondly, in respect to the general principles of international law. Our own statutes bind only our own Government and citizens. If they impose on us a larger duty than is imposed on us by international law, they do not correspondingly enlarge our duties to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law.

Mr. Bayard, in a previous year, in a letter to Mr. Valera, the Spanish minister, had expressed himself more pertinently in the following words:

> I need scarcely remind you that the phrase "neutrality act" is a distinctive name, applied for convenience sake merely, as is the term "foreign-enlistment act" to the analogous British statute. The scope and purpose of the act are not thereby declared or restricted. The act itself is so comprehensive that the same provisions which prevent our soil from being made a base of operations by one foreign belligerent against another likewise prevent the perpetration within our territory of hostile acts against a friendly people by those who may not be legitimate belligerents, but outlaws in the light of the jurisprudence of nations. There is and can be no "neutrality" in the latter case. If the hostile party carries his hostility beyond the pale of the law, he commits a crime against the United States, and is amenable to the prescribed process and punishment.

In the decision made by the Supreme Court of the United States in what is known as the "*Three Friends* case" Mr. Chief Justice Fuller delivered the opinion of the court in favor of holding the vessel concerned for violating the "neutrality act" by being engaged in the employ of the Cuban insurgents, in a hostile expedition against Spain. The opinion states that—

> In the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities" and gave an extended review of the situation.
>
> We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a Government with which the United States are on terms of peace and amity although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it can not be doubted that, this being so, the act in question is applicable.
>
> We see no justification for imparting into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed.

The *Itata* case presents some interesting points coming within this subject. It is as follows:

The *Itata*, a merchant steamer, was captured in May, 1891, in Valparaiso harbor by the Congressional party, then in insurrection against the established or Balmaceda Government of Chile. After capture she was given a light armament and used for transport and other purposes under the command of a naval officer.

Trumbull and Burt, the defendants in the case, came to the United States as agents for the Congressionalists and purchased arms and ammunition in New York, which were sent by rail to San Francisco.

The *Itata* was sent by the Congressionalists to the United States to receive the purchased arms and transport them to Chile. Convoyed by the war vessel *Esmeralda* as far as Cape San Lucas, the *Itata* proceeded from there under the command of the captain of the *Esmeralda* to San Diego. When she reached that port she was disguised as a peaceful merchantman, with another person ostensibly in command.

While at San Diego she took in stores of coal and provisions, some of which were marked *Esmeralda*.

Meanwhile the arms sent to San Francisco were shipped in a chartered schooner, the *Robert and Minnie*, which proceeded to Santa Barbara Islands, off southern California, to meet the *Itata* for the purpose of transferring the arms to her. Suspicion being aroused, the marshal of the district took possession of the *Itata* for a violation of the neutrality laws, a keeper was put on board, and a search made for the *Robert and Minnie*. Arrangements having been made, however, between the schooner and the *Itata*, on the 6th of May, 1891, the *Itata*, without clearance and against the protest of the ship keeper in charge, went to sea, putting the keeper on shore at the mouth of the harbor. On the 9th of May the *Itata* and the schooner came together about a mile and a half from San Clemente Island, one of the Santa Barbara group, and the arms being transferred to the *Itata*, this vessel left at once for Chile.

The Government of the United States had not at that date recognized the Congressional party as belligerents or otherwise.[1] The Navy Department of the United States had, however, directed the admiral commanding the naval force in the Pacific not to render any assistance to either party, instructing him, however, that the ships of the Congressional party were not to be treated as piratical so long as they waged war only against the established or Balmaceda Government.

The U. S. S. *Charleston*, however, was sent in pursuit of the *Itata*, but without success, the *Itata* reaching Iquique, Chile, in safety. The ship, however, was delivered into the hands of the naval force of the United States lying at anchor in that port and brought back under American auspices to San Diego, Cal. Here the ship was duly libeled.

The indictment was made under sections 5283, 5285, and 5286 of the Revised Statutes. As to section 5285, which prescribes penalties for anyone increasing the force of any foreign ship of war for use against any foreign State, etc., with which the United States are at peace, by adding to the number of her guns, etc., it was conceded that the evidence against the accused was insufficient.

As to section 5286, which prescribed punishment for any person who within the territory of the United States "begins or sets on foot or provides or prepares the means for any military expedition to be carried on from thence" against a foreign State, it was held that the expedition was begun in Chile and that sending a ship from Chile to the United States to transport arms back to Chile did not bring the ship under this section.

The counts under section 5283, which deals with the fitting out and arming of a vessel with the intent that such vessel be employed in the service of any foreign prince, State, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, etc., with whom the United States are at peace, etc., charged the defendants with unlawfully fitting out the *Itata* to cruise and commit hostilities against the established Government of Chile.

It was concerning this section that Judge Ross expressed his doubts

[1] The recognition by the United States of the victorious Congressional party as the established Government of Chile occurred about four months after these events.

as to its applicability to the case, upon the grounds that the Congressional party did not constitute "a people" within the meaning of the section. Taking the safe ground that the status of the insurgents was to be ascertained by the position of the political or executive department of the United States, he claimed, from the dispatches (especially that from the Navy Department previously quoted) that the Congressional party were a people "whom it is optional with the United States to treat as pirates," sustaining his position from Secretary Fish's letter concerning the Haitian insurgents in 1869 already quoted in this volume.

But the dispatches from the Navy Department applying to the Chilean insurrection first to Admiral McCann enjoined strict neutrality between the parties and afterwards to Admiral Brown instructed him "not to treat the ships of the Congressional party as piratical, so long as they waged war only against the Balmaceda Government." The judge seems to have held also that a recognition of belligerency or independence was necessary to cause the word "people" in the act to apply. This, however, must be considered to have been settled since by the decision in the "Three Friends Case," delivered by Chief Justice Fuller and referred to in a previous page.

The judge did not, however, rest his instruction to the jury to find a verdict of not guilty upon his doubts as to the applicability of this section to the case. None of the acts shown by the evidence constituted an arming, fitting out, or furnishing the *Itata* with the intent that she should cruise or commit hostilities against the established Government of Chile. On the contrary, her only purpose was that of a storeship to transport the arms in question to Chile to be used on shore there by the insurgents. This was held by the judge not to come in conflict with this or any other section of the laws referred to. In support of this view he quoted from an opinion of Attorney-General Speed,[1] in which it is said:

> I know of no law or regulation which forbids any person or Government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser.

We can close this part of the subject by again quoting from the words of Chief Justice Fuller, who says:

> Neutrality, strictly speaking, consists in abstinence from any participation in a public, private, or civil war, and in impartiality of conduct toward both parties, but the maintenance, unbroken, of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith toward friendly nations requires their prevention.

Section 61.—Contraband of War.

Upon this subject Dana says:

> The right of the belligerent to prevent certain things getting into the military use of his enemy is the foundation of the law of contraband; and its limits are, as in most other cases, the practical results of the conflict between this belligerent right, on the one hand, and the right of the neutral to trade, on the other.
>
> Belligerent interests might well contend that any merchandise sent into his enemy's country gives that enemy aid or relief—moral, financial, or physical. But to prevent such trade would be to end all neutral commerce. Neutral interests therefore insist on the strictest limits of the war right of seizure and have at times striven to confine the rule to instruments which are completedly and are for exclu-

[1] 11 Opinions of Attorney-General, 452.

clusively military use. The result of this conflict has left rather an undefined and irregular line.

Contraband trade may be defined as a trade with a belligerent with the intent to supply him with military or naval supplies, equipments, instruments, arms, or armament.

Contraband goods are munitions of war or articles which are designed or are capable of use as a support or assistance to the enemy in carrying on an offensive or defensive land or maritime war.

General law of contraband.—The general law of contraband may be given under two heads, as follows:

(1) A State may not lawfully furnish contraband articles to either belligerent, whether shipment be by land or by water.

(2) The citizens of a neutral State may sell contraband articles to a belligerent (ships of war or torpedo boats excepted) subject only to the risk of capture by the cruisers of the opposing belligerent; that is to say, such trade is legal from the neutral point of view and illegal from the belligerent point of view.

The neutral State is not bound to prevent the trade; but a belligerent may prevent it by seizing the goods in transit on the ocean, by the law of right of self-defense and self-preservation.

The question of unlawfulness, from a neutral standpoint, is given by Mr. Justice Kent in the case of Seton *v.* Low, in the supreme court of New York, in 1799. He speaks of the legality of the trade as follows:

I am of the opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which so far as it concerns the present question is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals and consequently unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers, and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade;[1] and yet at the same time, from the law of necessity, as Vattel observes, the powers at war have the right to seize and confiscate the contraband goods, and this they may do from the principle of self-defense. The right of the hostile powers to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the result of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war is therefore a lawful trade, though a trade from necessity subject to inconvenience and loss.

Probably the latest official formal declaration upon the subject with us is contained in President Grant's neutrality proclamation of August 2, 1870, in which it is said:

While all persons may lawfully and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war and other articles ordinarily known as "contraband of war," yet they can not carry such articles on the high seas for the use or service of either belligerent, nor can they transport soldiers or officers of either or attempt to break any blockade which may be lawfully established and maintained during the war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

Contraband articles carried overland can not, of course, be stopped. Since railway systems have been introduced and extended, a State, situated as nearly all of the nations of continental Europe are placed,

[1] This is somewhat too broad for the present day as to trade in vessels of war by neutrals.

can get supplies by land in time of war so long, at least, as it remains at peace with any of its neighboring States.

In 1870 Bismarck remonstrated against the shipment of coal from England to France. The English Government replied that during the Crimean war Prussia permitted her subjects to furnish Russia with all kinds of contraband articles across the border, and also permitted others to send such articles across Prussian territory to Russia.

It has been suggested that neutral States should be obliged to restrain the trade in contraband of war, and in the case of ships of war we have seen that this is growing to be the rule now. When it comes to the shipment of heavy guns, rifles, and ammunition in enormous quanties, it has been argued that there is hardly much difference in principle between such sales and those of ships; that the one may affect the course of the war as much as the other. Bluntschli, representing the German school, thinks that though trade in contraband on a small scale may be permitted, yet on a great scale it ought to be prohibited by the neutral States. Perhaps international law may develop in the direction of limiting such trade, but this seems doubtful at present, and the German practice in the war between Spain and the United States did not seem to conform to such theories. The trade between Krupp's establishments, in Germany, and Spain in warlike stores, carried overland, apparently suffered no restriction, either as to the quantity or the quality of the munitions of war.

The great difficulty of making a distinction between contraband trade upon a large and small scale would alone present a serious obstacle to such a rule. Austria in 1854 prohibited the export of contraband, but in 1870 and 1877 this prohibition was not attempted.

On the whole, we may conclude that the assumption by the neutral States of the task of preventing contraband trade is one not likely to be undertaken for the benefit of belligerents as an addition to the other and increasing duties required from the neutral State during modern warfare.

The question of contraband of war is almost exclusively one of transport upon the high seas, and hence an important question for officers of any navy that may become belligerent. Says Halleck:

> The liability to capture can only be determined by the rules of international law as interpreted and applied by the tribunals of the belligerent State to the operation of whose cruisers the neutral merchant is exposed.

In making captures of this kind it must be borne in mind that the question of evidence is involved as well as that of international law.

Moseley, in discussing this subject in a general manner, says:

> The tendency of all the recent authorities, both in works written on the subject and in judicial decisions, especially the decisions of Sir William Scott, goes to show that contraband or not contraband of war is a question of evidence, to be determined in each case by reference not to one particular rule of law, but many: not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are as in themselves, or as belonging to a class, capable of being applied to a military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use.

Classification of contraband.—Woolsey says:

> When, however, we ask what articles are contraband, the answer is variously given. Great maritime powers, when engaged in war, have enlarged the list: the nations generally neutral have contracted it. Treaties defining what is contraband have differed greatly in their specifications: the same nation in its conventions with different powers at the same era has sometimes placed an article in the category of contraband, and sometimes taken it out. Writers on the law of

nations, again, are far from uniformity in their opinions. To make the subject clear, it is necessary to enter into a consideration of different classes of articles.

In the *Peterhoff* case, Chief Justice Chase, of the Supreme Court of the United States, in delivering the opinion of the court, divided contraband into three general classes:

The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war;

The second, of articles which may be and are used for purposes of war and peace, according to circumstances; and

The third, of articles exclusively used for peaceful purposes.

Merchandise of the first class, destined for a belligerent country or places occupied by the army or navy, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege.

In the war with Spain the Navy Department of the United States issued instructions to blockading vessels and cruisers which will be found at length in the appendix. Paragraph 19 of these instructions, issued as General Order No. 492, reads as follows:

The term contraband of war comprehends only articles having a belligerent destination, as to an enemy's port or fleet. With this explanation, the following articles are, for the present, to be treated as contraband:

Absolutely contraband.—Ordnance, machine guns and their appliances and the parts thereof, armor plate and whatever pertains to the offensive and defensive armament of naval vessels, arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons, ordnance stores, portable range finders, signal flags destined for naval use, ammunition and explosives of all kinds, machinery for the manufacture of arms and munitions of war, saltpeter, military accouterments and equipments of all sorts; horses.

Conditionally contraband.—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged.

Article VI of the Royal Decree of Spain, drawn up with regard to the hostilities existing, or about to exist, with the United States, and dated April 23, 1898, reads as follows:

Under the denomination "contraband of war," the following articles are included: Cannons, machine guns, mortars, guns, all kinds of arms and firearms, bullets, bombs, grenades, fuses, cartridge matches, powder, sulphur, saltpeter, dynamite and every kind of explosive, articles of equipment, like uniforms, straps, saddles, and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers, and other articles used in the construction, repair, and arming of war ships; and, in general, all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband.

The principal articles mentioned in the classification of the instructions of the United States, but omitted in that of Spain, are horses, as absolutely contraband, and coal, money, and provisions, as conditionally contraband. Spain mentions one article—sulphur—which the United States omits.

As to horses, Hall justifies our classification when he says:

Under the mere light of common sense the possibility of looking upon horses as contraband seems hardly open to argument. They may, no doubt, be important during war time for agricultural purposes, as powder may be used for fireworks; but the presumption is not in this direction. To place an army on a war footing often exhausts the whole horse reserve of the country. The subsequent losses must be supplied from abroad, and more necessarily so as the magnitude of armies increases. Almost every imported horse is probably bought on account of the

government. If, in rare instances, it is not, some other horse is at least set free for belligerent use.

It has been the custom of England and France, also, to regard horses as contraband. By the twenty-fourth article of the treaty between France and the United States in 1778, horses, with their furniture, were held to be contraband. In the treaties between the United States and the South American republics cavalry horses are considered as contraband. Halleck says:

As between countries on the same continent, horses are usually regarded as contraband, since, when they can be readily transported, they form an important and peculiarly available contribution to military strength.

There is little doubt, with its great value as an agent in modern naval warfare, that coal will be increasingly ruled as conditionally contraband. Kent, in treating of articles that may be under certain conditions contraband, such as coal and provisions, says:

The most important distinction is whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port, or there may be an unusually large demand for warlike stores thereat in consequence of contiguity to one or other of the belligerent countries. But if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of military or naval equipment, it will be presumed that the articles are going for military use, although it is possible that the article might have been applied to civil consumption.

As it is impossible to ascertain the final use of an article ancipitis usus, it is not an injurious rule which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which a supply of those articles would be eminently useful.

England, during the Franco-German war, judged of coal in this way. She refused to consider it as unconditionally contraband, but vessels were prohibited from sailing directly from English ports with coal for the French fleet in the North Sea. It is probable that nations having a limited coal supply will strive to keep coal from the list of contraband articles. France and Russia are at the present time the leading opponents among nations to declaring coal as contraband of war.

Russia went so far as to declare at the time of the West African conference of 1884 that she would refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply the recognition of coal as contraband of war.

Provisions stand in the same position as coal. In the case of the *Jonghe Margaretha* it was held by Sir William Scott that provisions, in this case Dutch cheeses, going to a port of naval equipment of the enemy like Brest were to be treated as contraband of war.

In the case of the *Commercen* the Supreme Court of the United States held:

By the modern law of nations provisions are not in general deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of the destination. If destined for the ordinary use of life in the enemy's country they are not in general contraband, but it is otherwise if destined for military use. Hence if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.

France, in 1885, during her hostilities with China, declared shipments of rice destined for any port north of Canton to be contraband of war. England protested upon the ground that though in particular cases provisions may be treated as contraband, they can not be so declared in all cases. France justified her action by the fact that rice was essential to feeding the Chinese population as well as the Chinese armies. In the end the English Government notified the French Government that it would not consider itself bound by the decision of any prize court that would put into effect the doctrine advanced by France. No case, however, occurred during the hostilities, as the trade was stopped by the French declaration.

Mr. Kasson, then our minister at Vienna, wrote to the Secretary of State, calling attention to the importance to American commerce of the principle involved in the declaration of France, the United States being likely to be neutral in European wars and being at the same time a great food-exporting country. He went on to say:

> The real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed without the establishment of an effective blockade of ports. War itself would become more fatal to neutral States than to belligerent interests.

Money, silver plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war.

> Cotton was contraband of war during the late civil war, when it was the basis upon which the belligerent operations of the Confederacy rested. * * * Cotton, in fact, was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare.[1]

The question of contraband articles is largely a matter of treaty. The following list of articles held to be contraband is taken from the treaty concluded with Bolivia in 1858:

> This liberty of navigation and commerce shall extend to all kinds of merchandise excepting those only which are distinguished by the name of contraband of war. Under this name shall be comprehended—
>
> 1. Cannon, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines, pistols, pikes, swords, sabers, lances, spears, halberds, hand grenades, bombs, powder, matches, balls, and other things belonging to the use of these arms.
>
> 2. Bucklers, helmets, breastplates, coats of mail, infantry belts, and clothes made up in the form and for military use.
>
> 3. Cavalry belts, and horses, with their furniture.
>
> 4. And, generally, all kinds of arms, offensive and defensive, and instruments of iron, steel, brass, and copper, or any other materials manufactured, prepared, and formed expressly to make war by sea or land.
>
> All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the citizens of both contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded.

The following treaties give exactly the same list of contraband and hold the same language as to freedom of trade: Dominican Republic, 1867; Ecuador, 1839; Guatemala, 1849; Haiti, 1864; Mexico, 1848.

The treaties with the United States of Colombia, 1846, Salvador, 1850, give the same list of articles directly contraband, but add "provisions that are imported into a besieged or blockaded place." These are the only treaties, it may be noted, concluded by the United States

[1] Secretary Bayard to Señor Muruaga, June 28, 1886.

subsequent to the treaty of 1794 with Great Britain, in which it is admitted that provisions become contraband under any circumstances. The reason for including them in the list of contraband in the cases named is not clear, since they would be condemned on another ground, namely, breach of blockade.

The following treaties contain substantially the same list of contraband as that given above:

Italy, 1871—the treaty "expressly declares that the following articles, and no other, shall be considered under this denomination." Horses are omitted from the list, but "war saddles and holsters" are included.

Holland, 1872—"soldiers, saltpeter, sulphur, and saddles" are included. Naval stores of all kinds are expressly excepted from the list of contraband, "even if suited for the construction and equipment of vessels of war and for the manufacture of implements of war."

Sweden, 1783, renewed by treaty with Sweden and Norway, 1827—includes "sulphur and saltpeter" and expressly excludes naval stores.

Russia, 1799, renewed by the treaty of 1828—includes "saltpeter and sulphur" and omits horses.

France, 1800—includes saltpeter in the list, but omits horses.

Venezuela, 1860—adds saltpeter to the list.

Treaties with Brazil, 1828, and Chile, 1832, contained the same list of contraband as that given in the treaty with Bolivia, but were all terminated in pursuance of formal notifications given by those Governments.

It follows, then, that the United States at present hold defined and limited agreements as to contraband with Bolivia, Colombia, Santo Domingo, Ecuador, France, Guatemala, Haiti, the Netherlands, Italy, Mexico, Prussia, Salvador, Sweden and Norway, and Venezuela.

Sulphur, as an element entering into explosives is not of so much importance as formerly, but its use in the manufacture of unwarlike articles is extending. In the recent war with Spain, Italy endeavored to have Spain remove sulphur from its list of contraband but without success.

In the *Peterhoff* case it was held by the courts of the United States that destination to a neutral port will not protect from capture articles of contraband where an ultimate destination to the enemy's country or blockaded port can be shown, the immediate neutral destination being used only to cover the transaction.[1]

Penalty of carrying contraband.—Halleck says:

> The inception of the voyage is held to complete the offense: and from the moment that the vessel with the contraband articles on board quits her port on a hostile destination the capture may be legally made. It is by no means necessary to wait till the ship and goods are actually endeavoring to enter the enemy's port. The voyage being illegal[2] at its commencement, the penalty immediately attaches and continues to the end of the voyage, or at least so long as the illegality exists.

In the case of Carrington *v.* Merchants' Insurance Co. it was decided that when the contraband goods have been deposited at the port of destination neither the vessel nor the cargo is liable to seizure on the return voyage, though the new cargo may have been purchased with the proceeds of the contraband.

As to indirect voyages, in his decision in the case of the *Stephen*

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[1] See case of Stephen Hart. Snow, p. 515.

[2] That is, from the standpoint of the belligerent whose interests are likely to be injuriously affected by the voyage.

Hart, which contains on the whole the clearest and most forcible statement of the principles and circumstances involved in what is known as continuous voyages, Judge Betts says:

This court holds that in all such cases the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture as well before arriving at the first neutral port at which she touches after her departure from England as on the voyage or transportation by sea from such neutral port to the port of the enemy.

In these times of international and extensively developed railway systems, the carriage of contraband at sea could not be entirely stopped where continental conditions exist unless this manner of dealing with continuous voyages be adopted. Wherever insular countries are concerned, although evasions may still be made by the use of intermediate neutral ports, still the circumstances render such evasions much more difficult. Statements were made during our war with Spain that ports in Jamaica and on the Mexican and Central American coasts were used as intermediate ports to ship contraband or evade the blockade of Cuba. In regard to the penalty of the carriage of contraband, Kent says:

When goods are once clearly shown to be contraband, confiscation is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of preemption on reasonable terms. But generally to stop contraband goods would, as Vattel observes, prove ineffectual relief, especially at sea. The penalty of confiscation is applied in order that the fear of loss may operate as a check on the avidity for gain and deter the neutral merchant from supplying the enemy with contraband articles. The ancient custom was to seize the contraband articles and keep them, on paying their value. But the modern practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights. It is a general understanding, grounded upon true principles, that the powers at war may seize and confiscate all contraband goods without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796 that neutral governments were bound to restrain their subjects from selling or exporting articles, contraband of war, to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to belligerent powers contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authority of that country. The right of the neutral to transport and of the hostile power to seize are conflicting rights, and neither party can charge the other with a criminal act.

As to the neutral carrier, Dana says:

By the present practice of nations, if the neutral has done no more than carry goods for another which are in law contraband, the only penalty upon him is the loss of his freight, time, and expenses. If he makes use of fraudulent devices to mislead the belligerent and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy. So, if he not only carries contraband goods but engages in a contraband service. * * * But if she (the vessel) has no relation with the enemy's government, and, as a private merchant vessel, is carrying goods on private account, as merchandise, to the enemy's ports, to be put into the market there or delivered into private hands, she is not, as the practice is now settled, liable to condemnation, whatever be the character of her cargo. * * *

The interests of peace and commerce on the one hand, and those of war on the other, have, in the conflict of their forces, rested at a practical line of settlement. The interests of peace have prevailed so far as to permit the carrier to transport contraband goods, subject to no other penalty than the loss of his commercial enterprise, i. e., his freight and expenses, while the interests of war have prevailed so far as to permit the belligerent to stop the contraband goods on their passage and convert them to his own use. The advantage of this is that the carrying trade of the world may go on, subject to an ascertainable risk, which may be provided

for by contract and guarded against by insurance: and producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious artic es. At the same time the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practice or hostile service.

Chief Justice Chase, in the *Peterhoff* case, says:

It is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation."

So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness and the other contraband goods must be also condemned.

Lord Stowell had previously, in the Staadt Embden, said that in his opinion the law of nations required that innocent articles, to escape the contagion of contraband articles of a cargo, must be the property of a different owner.

It is the current practice, where the ship and the contraband articles of the cargo belong to the same owners, to confiscate the vessel as well as the articles. Ortolan differs from the common ruling upon this subject by advocating the release of the vessel carrying the contraband even if owned by the same owners.

The United States, in a treaty with France in 1800, which expired in 1808, and with Sweden, the Central American republics—Mexico, Venezuela, Peru, Ecuador, and New Granada—at other times, have established the practice, as between the United States and those countries, of allowing the continuance of the voyage of the neutral carrier of contraband if he abandons the contraband on board of the belligerent. This would of course mean a quantity sufficiently small to be received by the captor.

Hall says that it can scarcely be believed that the vitality of such a practice could stand the test of a serious maritime war, while Dana says:

As the captor must still take the cargo into port and submit it to adjudication, and as the neutral carrier can not bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all the papers and deliver them to the captor, and certainly the testimony of the persons on board can not be taken at sea in the manner required by law.

Dana goes on to say that a strong argument might be made from these considerations that the clauses in the treaties containing this rule can only be applied to cases where there is the capacity on the part of the neutral vessel to insure the captor against a claim on the goods. In any case the contraband articles are not legal prize until condemned. Mr. Dana's argument as to the treaties with the American Republics extends also to the peculiar provisions of the treaty with Prussia.

By the treaty with Prussia of 1799, continued in part by that of 1828, it was agreed that even articles directly contraband should not be confiscated. Vessels of either party having contraband on board, may be stopped and detained as long as the belligerent judges necessary to protect himself from the effects of the delivery of the contraband to the enemy, but the neutral proprietors are to receive a reasonable compensation for the loss occasioned by the detention. Or the captor

may take any or all of the contraband merchandise for his own use, paying for it the market price at the port of destination. The treaty contains the same stipulations for the freedom of the vessel on delivery of the contraband to the captor as is found in other treaties cited.[1]

There is one penalty or restriction yet to be referred to, and that is what is known as the preemption of contraband articles. Hall says:

> In strictness, every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to preemption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at 10 per cent on the amount. This mitigation of extreme belligerent privileges is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband.

Sec. 62. Unneutral Service or Persons and Dispatches as Contraband.

The carrying of certain persons and dispatches by neutrals for belligerent purposes is not really a contraband act, but is sufficiently like such an act to be generally discussed under the head of contraband of war. Hall places acts and adventures of this kind under a distinct head, namely, "Analogues of contraband." Dana and T. J. Lawrence speak of them as unneutral acts, the latter giving the distinct title of "Unneutral service" to such acts.

These acts differ from contraband acts by a closer connection and association with the belligerent than can be affirmed by the mere transport of contraband of war; and, as the title of Lawrence suggests, the acts are more in the nature of a direct service to a belligerent than that involved in the transporting of merchandise for sale to a good market. These acts are not violations of neutrality that involve the government of the neutral State, as they are done either beyond the jurisdiction of such State or with so much secrecy that they can not readily be detected or prevented. Woolsey says:

> If the obligations of neutrality forbid the conveyance of contraband goods to the enemy they also forbid the neutral to convey to him ships, whether of war or of transport, with their crews, and still more to forward his troops and dispatches. These have sometimes been contraband articles. * * * But in truth, as Heffter remarks, they are something more than contraband, as connecting the neutral more closely with the enemy. A contraband trade may be only a continuation of one which is legitimate in peace, but it will rarely happen that a neutral undertakes in time of peace to send troops of war to another nation, and the carrying of hostile dispatches implies a state of war.

A neutral vessel which is used as a transport for a belligerent is subject to confiscation upon capture by the other belligerent, and the military or naval persons become prisoners of war. It is immaterial whether the vessel be a transport by voluntary contract or otherwise, and it is also immaterial whether the number of persons carried be great or small. As Wheaton says, "To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment."

In the case of the *Orozembo*, in 1807, an American vessel chartered to convey three military persons of distinction and two civil officials, the vessel was condemned by Sir William Scott. In this case, as in that of the *Friendship* and the *Caroline*, the offense was rather one of engagement of the vessel as an enemy transport than a mere carrying of the military persons of the enemy as passengers. An English

[1] Glass, International Law, p. 402.

court in 1855 went so far during the Crimean war as to condemn a Bremen ship, the *Greta*, for carrying 270 shipwrecked Russian officers and seamen from a Japanese to a Russian harbor. Hall says:

> In the transport of persons in the service of a belligerent the essence of the offense consists in the intent to help him: if, therefore, this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

Concerning this statement it may be well to remark that the nature of the act should be held as sufficient evidence of the intent of the neutral individual.

A neutral ship should not, in general terms—

1. Transmit or repeat certain messages or information to or for a belligerent.
2. Carry certain dispatches for a belligerent.
3. Transmit certain persons in the service of a belligerent.
4. Accompany naval or military forces as auxiliaries, that is, as colliers, supply, or repair vessels. Hospital ships or transports under the Red Cross are, of course, not included in the above.

As to the first category, if a neutral vessel repeats signals made between fleets or ships or from shore to ships, it is manifest that such vessel is serving one belligerent at the expense of another to an extent that the other can but regard her as an enemy and treat her so while she is performing this unneutral service.

In the same manner, a vessel which is engaged in laying, cutting, or repairing a telegraph cable in war time, for exclusively war purposes, is serving one belligerent most effectively at the expense of the other.

The second undertaking which may be considered as forbidden to a neutral ship is the carriage of certain classes of dispatches for a belligerent. The kind of dispatches referred to are military or naval dispatches or dispatches between a belligerent government and the officials of its colonies and dependencies. Diplomatic and consular dispatches of a general nature may be carried without involving a performance of unneutral service or without subjecting vessels to the penalties of such service.

Concerning this, Sir William Scott ruled that—

> The carrying of two or three cargoes of military stores is necessarily an assistance of limited nature, but in the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the plans of the other belligerent in that part of the world. * * * It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most noxious and hostile nature. The offense of fraudulently carrying dispatches in the service of the enemy being then greater than the carrying of contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which constitutes the penalty in contraband where the vessel and cargo do not belong to the same person, would be ridiculous when applied to dispatches. There would be no freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must therefore be confiscated.[1]

[1] Wheaton, 635, 636.

Hall, discussing the question of mail and other regular steamers, says:

If a neutral, who has been in the habit, in the way of his regular business, of carrying post bags to or from a belligerent port, receives sealed dispatches with other letters in the usual bags, or if he receives a separate bundle of dispatches without remuneration, he can not be said to make a bargain with the belligerent or to enter his service personally for belligerent purposes. He can not be said to have done an act of trade, of which he knows the effect will be injurious to the other belligerent. Dispatches may be noxious, but they may also be innoxious, and the mere handing of dispatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral, accepting dispatches in this manner, can not therefore be subjected to a penalty. When, again, a neutral, in the way of his ordinary business, holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he can not be supposed to identify himself specially with belligerent persons in the service of the State who take passage with him. * * *

Vessels not being subject to a penalty for carrying dispatches in the way of ordinary business, packets of a regular mail line are exempted as of course, and merchant vessels are protected in a like manner, when, by municipal regulations of the country from the ports of which they have sailed, they are obliged to take on board all government dispatches or letters sent from the post-offices.

The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post bags may be seized on account of dispatches believed to be within them. But the secrecy and regularity of postal communication is now so necessary in the intercourse of nations, and the interests affected by every detention of the mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt be shown in a naval war to mail vessels and their contents, and it may be assumed that the latter would be seized under very exceptional circumstances. France, in 1870, directed its officers that "when a vessel subject to visit is a packet boat engaged in postal service, and with a government agent on board belonging to the State of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and dispatches on board." It is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no national guaranty of the innocence of the contents of the mail can readily be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary way through its post-offices. To give immunity from seizure as of right to neutral mail bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or distant expeditions sent out by it, and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail bags upon a declaration in writing being made by the agent of the neutral government on board that no dispatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

Paragraph 15 of the instructions of the Navy Department to blockading vessels and cruisers, drawn up for the war with Spain, says:

A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure, but not when she is a mail packet and carries them in the regular and customary manner, either as a part of the mail in her mail bags or separately, as a matter of accommodation and without special arrangement or remuneration. The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

There can not be any reasonable objection on the part of a belligerent to the carriage of private mail from another belligerent, even during hostile operations, by a neutral merchant vessel met at sea or elsewhere.

The transportation by a neutral of certain kinds of persons in the service of a belligerent can be most objectionable.

A neutral does not come within the forbidden limits if he transports on board a regular passenger steamer individuals who come on board as ordinary passengers, even if they should turn out eventually to be officers or isolated individuals in the service of one or the other of the belligerents.

In the case of the *Friendship* Lord Stowell stated that no British tribunals had ever decided against a neutral vessel for carrying a military officer in the service of an enemy if he went as an ordinary passenger and at his own expense. But naval or military persons coming on board in that character, and being transported by a neutral vessel at the expense of a belligerent government, subjects this vessel to a capture and confiscation.

Dana sums up the whole subject of carrying persons and dispatches by giving three rules which he claims to be in accord with the decisions of English prize courts and with the policy of the English Government, as well as with the decisions of the prize courts and national acts of other States. They are:

(1) If the vessel is in actual service of the enemy as a transport, she is to be condemned. In such case it is immaterial whether the enemy has got her into his service by voluntary contract or fraud. It is also in such case immaterial what is the number of the persons carried or the quantity or character of the cargo; and, as to dispatches, the court need not speculate on their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner pro tempore, the true ground of condemnation should be as enemy's property. The interpretation of this technical phrase of prize law will cover all such cases.

(2) If a vessel is not in the enemy's service, still, if the master knowingly takes for the enemy's government or its agents persons or papers of such a character or destination that the transporting of them under the neutral flag is an actual belligerent service to the State, it is an unneutral act which forfeits the vessel. If he avers ignorance of the character of the persons or papers, all the circumstances are to be considered for the purpose of determining not only the truth of his averment, but whether his ignorance, though real, is excusable. He is bound to a high degree of diligence in such cases, and if the circumstances fairly put him on inquiry, which he does not properly pursue, he will not be discharged. Among those circumstances are the character of the dispatch, as far as shown from itself, the circumstances attending its delivery or custody, and the character of the ports of departure and destination of the vessel as being neutral or hostile. In the case of a vessel not in the enemy's service, but doing such acts for his benefit, can she be said to be enemy's property pro hac vice?

(3) It is not an unneutral intervention, entailing a penalty, to knowingly carry a dispatch of a character recognized as diplomatic in the international intercourse of States. Of this class is a dispatch passing either way between the enemy's home government and its diplomatic agent in a neutral country, or between a neutral government and its diplomatic agent in an enemy's country; and consuls-general come within the privilege of this rule. But if the dispatches are placed within a private vessel of the nation with whom the ambassador's nation is at war, and she is captured by a cruiser of the former nation, the dispatches have no immunity.

As to the cases mentioned under this last grouping, it may be said that the dispatches from a neutral diplomatic agent to a belligerent, or vice versa, should be exempt from seizure upon the ground also that they may be as important to the interests of the neutral as to the interests of the belligerent State, and hence their transmission, as Dana says, is not an unneutral act.

Paragraph 16 of the instructions of the Navy Department, previously referred to, says that—

A neutral vessel in the service of the enemy, in the transportation of troops or military persons, is liable to seizure.

There are two famous cases that come within the limits of this subject that may not improperly be discussed here. The first is the case of the *Trent*.

The *Trent* was one of a line of English mail steamers plying between Havana and St. Thomas, there connecting with a line for England. At an early stage of our civil war, in 1861, Messrs. Mason and Slidell, with their secretaries, took passage on board the *Trent* at Havana for England. These gentlemen had been appointed as diplomatic agents by the Confederate Government to England and France, and had with them dispatches and instructions which were under their personal charge.

The *Trent* was overhauled on the high seas by the U. S. S. *San Jacinto*, and Messrs. Mason and Slidell, with their secretaries, forcibly removed from the *Trent*, their dispatches being secretly by them given to some of the passengers to be taken to Europe. There was no evidence or charge that the commander of the *Trent* aided in the concealment or forwarding of these dispatches. He denied the right of search by the cruiser, obstructed in every way the acts of Captain Wilkes, and vielded only to superior power. Captain Wilkes permitted the *Trent* to proceed and took Messrs. Mason and Slidell as prisoners to the United States. The act of Captain Wilkes was unauthorized by our Government, and upon demand by the British Government the persons were surrendered. Mr. Seward admitted that these persons could not lawfully be taken from the *Trent* at sea, but contended that she might have been brought in as a prize.

Mr. Dana says in regard to this affair:

This celebrated case can be considered as having settled but one principle, and that had substantially ceased to be a disputed question, viz, that a public ship, though of a nation at war, can not take persons out of a neutral vessel at sea, whatever may be the claim of her Government on those persons. It has been borne in mind that Earl Russell in his demands makes no reference to the diplomatic character of Mason and Slidell, or to any special right of exemption in this case. He presents the naked fact that a United States vessel of war had taken persons from an innocent British neutral vessel at sea. To his reclamation against such proceeding the United States were only too glad to assent, considering it a triumph of their own principles, secured by their own decision, made against a strong national feeling in the particular case on the demand of the only power that had ever contended for the opposite doctrine.

Sir Sherston Baker, in examining the question, says:

The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory or ships of your own country are places of which you are yourself the master. The enemy's territory or the enemy's ships are places in which you have the right to exercise acts of hostility. Neutral vessels, guilty of no violation of the laws of neutrality, are places where you have no right to exercise acts of hostility.

Mr. Thomas L. Harris, an American writer, in a work wholly devoted to this case, sums up his views of the whole question in the following conclusions:

1. The commissioners were not contraband of war in any sense of the term.
2. Their dispatches, being of a nonmilitary character, were not contraband of war.

3. A neutral power is entitled to hold necessary informal relations with an unrecognized belligerent.

4. The *Trent* had in no way violated her duties as a neutral ship when she was stopped by the *San Jacinto*.

5. Captain Wilkes had an undoubted right to stop and search the *Trent* for contraband of war. In the absence of anything of this character, resistance to the right of search alone would have made the *Trent* liable to capture.

6. In any event, Captain Wilkes had no right to seize the persons or dispatches of the Confederate commissioners while they were on board the *Trent* on the high seas.

7. Viewed solely from the standpoint of international law, sound reasons were not given for the surrender of the commissioners by Secretary Seward.

In most discussions of this question the point of view of the case has been that of contraband of war rather than from that of unneutral service.

The comparatively recent case of the *Kowshing* also comes under this head of an unneutral service, and is as follows:

The *Kowshing* was an English steamer, engaged ordinarily in the Chinese coasting trade. She was chartered by the Chinese Government especially to carry troops from China to Korea before the actual outbreak of hostilities between China and Japan, but at a time when a controversy and strained relations existed between them concerning Korea, and just before hostilities commenced. This controversy was a public affair, and the *Kowshing* was one of the ten transports chartered by China to carry troops exclusively to different parts of Korea, which was also out of their usual routes.

The *Kowshing* had on board about 1,200 Chinese soldiers, with arms and ammunition, two Chinese generals, a German officer who had been employed in a military capacity by the Chinese for years, and 12 field guns. On the morning of the 25th of July, 1894, when entering the Korean archipelago, near Chemulpo, the *Kowshing* was met by three Japanese vessels of war, one of whom ordered her to anchor and afterwards to follow the Japanese vessel. This latter the master of the *Kowshing* was forbidden to do under penalty of death by the Chinese soldiery on board and their officers. These latter also prevented the English master and officers of the *Kowshing* from leaving the ship, which facts were communicated to the Japanese vessel of war, the *Nan-iwa-kan*. The *Nan-iwa-kan*, in view, it is supposed, of the menacing attitude of the Chinese, refused to send a boat to the *Kowshing*, but after warning the Europeans to leave the vessel, sunk the *Kowshing* by gun and torpedo fire. The lives lost were in number over 1,000, some of whom were Europeans belonging to the ship. No indemnity nor reparation was claimed from the Japanese by the English Government, but it is understood that an indemnity was required from and paid by the Chinese Government for certain persons and losses in the *Kowshing*, as it has been stated, and apparently without contradiction, that certain war risks were guaranteed by the agents of the Chinese Government to the company owning the *Kowshing*.

It has been asserted that the Japanese Government were at fault in destroying the *Kowshing* before the declaration of war, and as innocent neutral property. Without going into the question of hostilities without declaration of war, which is treated elsewhere, it appears in the face of matters that, as the *Kowshing* was chartered with the probability of hostilities and without proviso making the charter void in case of hostilities, that she was engaged in an enterprise which, military in its character, might at any moment be warlike service for a bellig-

erent, and hence unneutral service, with its liability to seizure and condemnation.

The destruction of the vessel with its military and other passengers was an extreme penalty, and might well have been avoided by the good judgment of a humane foe, though it must be borne in mind that although the Japanese war vessels were mechanically superior to the *Kowshing*, yet in the number of the personnel of the armed force the *Kowshing* was the superior, as well as in the hands of an unreasoning enemy, who refused to allow obedience to the directions of the vessels of war or to surrender as prisoners, or even to allow the ship to be brought before a prize court for trial as engaged in the unneutral service of the enemy. Nothing justifies the conduct of the Japanese, proven by the evidence, in firing upon the Chinese in the water after the sinking of the ship, but they seemed to have avoided any technical violation of the rules of international law, as the *Kowshing*, being practically an enemy vessel, was engaged in a hostile enterprise and taken by force out of the control of the neutral commander and his officers. The risks incurred were hence the same as the risks that pertained to a Chinese vessel engaged in operations adjudged by the Japanese to be hostile against themselves.

Chapter XI.

Blockade; Continuous Voyages; Right of Search.

Section 62.—Basis and Character of Blockades.

Blockades may be either military or commercial, or may partake of the nature of both. As military blockades, they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of an enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist.

As commercial blockades, they may consist of operations against an enemy's trade and revenue, either localized at a single important seaport or as a more comprehensive strategic operation by which a portion or the entire sea frontier of an enemy is placed under blockade. A measure of this kind was applied by the British in the war of 1812 to our Atlantic coast; by the Federal Government in the civil war to our Southern Atlantic and Gulf coast, and by the United States to the coasts of Cuba in the war with Spain. A measure of this kind is a war operation of vital importance, conducing strongly to a successful peace, not only by the suppression of that part of a nation's revenue arising from customs duties, but by causing a cessation or great reduction of the export of the great products of the country, upon the movement and sale of which so much of the prosperity and the livelihood of its citizens depend. It may also cut off the supply or the imported part of the supply of the materials requisite for the effective conduct of the war.

Efforts have been made to do away with commercial blockades by neutral nations. The United States at one time advocated such abolition, but afterwards, during the period of the civil war, established the largest commercial blockade ever known. Of this blockade Dana says:

> It extended from the Potomac to the Rio Grande, both on the Atlantic coast and the Gulf of Mexico, over a stretch of over 3,000 miles. Except at Charleston, the blockading force made no attempt to reduce the cities blockaded. Not more than one of the ports, and that only for a portion of the time, was a naval station of the enemy. None of them were military or fortified towns, unless every town is such which is defended at all, and none of the ports except Charleston, and for a short time one or two others, were subjects of direct military operations looking to their siege or reduction. This vast blockade for four years was purely commercial. The great aid it contributed toward the diminution of the resources of the enemy, their exhaustion and final surrender, and the now generally recognized necessity for it, have doubtless been instructive to America and the rest of the world. It has been shown that there may be wars in which such a blockade may be extremely useful, if not necessary. At the same time it has shown that a blockade, commercial in its immediate action, may be a necessary part of a large system of military strategy in its more remote relations. The strategy was to surround the entire rebel territory by sea and land, force it in upon itself, reducing its proportions and resources, and making advances into its interior from the seacoast or by land at such points as should be selected. The blockade of the entire coast did not only cut off the commerce and shut in the naval force of the enemy, but compelled them to maintain

military forces to defend ports from possible attacks of the ships, so diverting their strength from the immediate scenes of operations by the armies.

Charleston was, as Mr. Dana suggests, an example of a sea investment or military blockade and a commercial blockade combined. In cases of this kind a much larger blockading force is necessary, partly to carry on the attack upon the enemy's fortifications, and also because these fortifications assist the entrance of the blockade runners.

A blockade being an operation of war, any government, independent or de facto, whose rights as a belligerent are recognized, can institute it as an exercise of those rights.

The circumstances of a land and sea blockade are very different, one being carried on in territory of which the blockader is in possession, while the other extends over both marginal waters and the high seas. The sea being the highway of all nations, the blockade with which international law is chiefly concerned, since it involves the relations of belligerents with neutrals, especially with the neutrals as individuals, is the sea or maritime blockade.

The neutral has the general right of trade and access to a belligerent, unless this right comes in contact with the special needs and operations of the other belligerent; but these needs and blockades, as in other matters of the kind, must be duly set forth and carried on under certain rules and usages in conformity with the law of nations.

Among the first of the rules is the one that the blockade must be properly instituted, and sufficiently made known to all likely to be affected by its institution. Says Halleck:

> The institution of a siege or blockade is a high act of sovereignty, and must proceed either directly from the government of the State or from some officer to whom the authority has been expressly or impliedly delegated.

Notification of blockade.—Kent says:

> It is absolutely necessary that the neutral should have had due notice of the blockade in order to affect him with penal consequences of a violation of it. This information may be communicated to him in two ways—either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists and he has a knowledge of it, he is bound not to violate it. A notice to a foreign government is a notice to all the individuals of that nation: and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

There is a difference in the usage of nations as to the amount of notification necessary to be given to neutrals. The practice of the United States and Great Britain, which is followed by Germany and Denmark, is to recognize two kinds of blockade—one de facto, which begins and ends with the fact and which condemns no vessel attempting to enter the harbor unless previously warned off, and the other a blockade of which notice is duly promulgated and accompanied by the fact. In the latter case it is to be presumed that the blockade continues until notice to the contrary is given by the blockading State. In this case ignorance of the blockade is not accepted as an excuse for sailing for the blockaded port or an appearance in its vicinity. Being bound to a blockaded port is considered evidence, under ordinary circumstances, of an intention to violate the blockade.

The French practice, which is also followed by Italy, Spain, and Sweden, is to give a notification from the government of the blockading State and a notice from a vessel of the blockading force of a port. Each neutral vessel is individually warned by one of the blockading

squadron, a vessel not blockading being considered incompetent to warn the vessel. The warning is indorsed on the ship's papers, with date and locality, and only on subsequent attempts to enter is the vessel liable to seizure. Comparing the two methods, Hall says:

> The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sail with the destination of a blockaded port from a place at which the fact of the blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning. But in practice, notification of some sort is always given. If the blockade is instituted under the direct authority of the government, the fact of its commencement is notified to foreign States. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them.

Furthermore, if approach for inquiry or for warning, after due general notification, were permissible in these days of fast steamers, "it will be readily seen," as Judge Field observed, "that the greatest facilities would be afforded to elude the blockade."

The President's proclamation of blockade of April 19, 1861, stated in general terms that neutral vessels would be individually notified at each blockaded port, but Commodore Pendergrast, commanding the North Atlantic blockading squadron, in giving notice of the actual commencement of the blockade under the President's proclamation, limited the warning to vessels in ignorance of the existence of the blockade. This construction of the President's proclamation was not disavowed by the Government and was upheld by the courts of the United States in the prize cases brought before them.

Judge Grier ruled:

> A vessel which has full knowledge of the existence of a blockade before she enters upon her voyage has no right to claim a warning or indorsement when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade and get the first information from the blockading vessel.

After these decisions were made this usage became settled and accepted, and no complaints were made against this construction of the proclamation of the President, "and under it," says Dana, "the law respecting notice of blockades was applied as heretofore in the English and American courts."

In the instructions to blockading vessels and cruisers, drawn up for the war with Spain, the following paragraphs bear upon this subject:

> 3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the Government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize, and should formal notice not have been given, the rule of constructive notoriety should be construed in a manner liberal to the neutral.
>
> 4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free, and should she again attempt to enter the same or any other blockaded port as to which she has had notice, she is good prize.
>
> 5. Should it appear from a vessel's clearance papers that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at

that port, she should be sent as a prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed.

6. A neutral vessel may sail in good faith for a blockaded port, with an alternative destination to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But in such case she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her cruise before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure.

Blockades as a rule are instituted to prevent both ingress and egress, and it is a settled usage that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it has been commenced. The vessel is allowed to come out, however, with the cargo which was on board when the blockade was instituted, and a certain period is generally allowed after the commencement of the blockade before the egress of a vessel is a breach of blockade. In the war with Spain this period was one of thirty days.

What constitutes an effective blockade.—Halleck says:

It is now a well-settled principle of international jurisprudence that a lawful maritime blockade of a port requires the actual presence of the blockading force. A mere proclamation of notification of one belligerent that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of the hostile force sufficient of itself to make the blockade a legal one: it must not only be actually present, but it must be large enough to prevent communication, or at least to render it dangerous to attempt to enter the port.

The actual force necessary to maintain an effective blockade varies with the circumstances. A treaty between France and Denmark, concluded in 1742, required that the entrance of a port should be closed by at least two vessels, or by a battery on shore. A later treaty between Holland and the Two Sicilies required the presence of at least six vessels at the distance of a little more than gunshot from the port, or the existence of batteries on shore so placed that entry could not be made except by passing under the guns of the besieger.

The declaration of Paris in 1856 prescribed:

Blockades to be obligatory are to be effective—that is to say, maintained by a sufficient force to shut out the access of the enemy's ships and other vessels in reality.

The United States have practically become a party to this declaration, but have in the instructions issued during the war with Spain adopted a more satisfactory definition of an effective blockade. This definition reads as follows:

2. A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous. If the blockading vessels be driven away by stress of weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade—such as chasing a blockade runner—or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of a blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score.

It was decided in the case of the *Circassian* that a blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.

An occasional evasion of a blockade does not prevent it from being effective. Lord Russell, after consultation with the law officers of the Crown, wrote as follows to the British minister at Washington in 1862 concerning our blockade during the civil war:

Her Majesty's Government are of the opinion that, assuming that the blockade is duly notified, and also that a number of ships are stationed or remain at the entrance of a port, sufficient really to prevent access or to create evident danger on entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it will not in itself prevent the blockade from being an effective one by international law.

Hall says further on this subject:

Provided that access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighborhood of Montevideo; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of 120 miles from the town by a ship in the Lyser Ort, a channel 3 miles wide, which forms the only navigable entrance to the gulf.

The difficulty of blockading certain ports during our civil war may be appreciated when it is stated that the blockade of the port of Wilmington in 1864 required a force of fifty vessels, all of speed, and some of them the fastest in the United States Navy.

A blockade is raised when an enemy's force succeeds in driving off the vessels engaged in the blockade or when the blockading vessels are withdrawn by the government instituting the blockade. But in case of hostile attack it must be shown without question that all of the blockading vessels were driven from their stations off the port. In this case the same notice is required for a renewal as for the original establishment of the blockade.

A blockade whose establishment has been regularly notified to neutral governments must be presumed to continue until notification is given by the blockading government of a discontinuance, unless clear proof to the contrary can be shown.

In the case of the *Nancy* (Snow's Cases, p. 494) it was held by the privy council of Great Britain in 1809 that where the blockading force is temporarily absent from the port blockaded, in order to accomplish other objects, no penalty attaches to a vessel which enters and leaves the port during such absence. In this case it was held that the periodical appearance of the vessel in the offing could not be supposed to be a continuation of a blockade, which had been previously maintained by a number of vessels and with such rigor that no vessel had been able to enter the island (of Martinique) during its continuance.

If the blockading force becomes insufficient and negligent in its blockade or partial in the execution of its duties toward individual ships or toward one nation more than another, the blockade may be ruled to be ineffective and void.

A constructive or paper blockade is one established by decree or proclamation only, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port supposed to be blockaded. Such a blockade is null and void, and captures made under it are no longer recognized as legal captures by any nation.

Says Woolsey:

A blockade is not confined to a seaport, but may have effect on a roadstead or portion of a coast, or the mouth of a river. But if the river is a pathway to interior neutral territories, the passage on the stream of vessels destined for neutral soil can not be impeded.

For this reason the Rio Grande could not be blockaded during our civil war.

Any public vessel of the belligerent power establishing a blockade is competent to capture ships that have run the blockade or are discovered at sea bound for a port which is known to be blockaded. In the case of the *Memphis*, it was held that a capture was valid when made by a vessel not stationed at the blockaded port, as the blockade runner did not purge her offense by a successful act of fraud or deceit in preventing an arrest by the force supporting the blockade.

In reference to the actual visibility of a blockading vessel or vessels from the blockaded port, it must be borne in mind that the necessary requirements are to make ingress to or egress from the port dangerous. It is not necessary that the blockading vessels should be in sight from the blockaded port. Nelson states, for instance, that fault was found with the blockade of Genoa, on the ground that it did not comply with the requirements of international law, the complaint resting apparently upon the statement that the blockaders could not be seen from Genoa. Nelson replied that the proof of evident danger to vessels seeking to enter or leave rested on the fact that captures were made; and it is, he said, "Absurd to say that there can be no danger to a vessel seeking to enter a blockaded port because the blockading vessels are not visible to the port. Much more depended upon their number, disposition, and speed." He further said :

> From my knowledge of Genoa and its gulf, I assert, without fear of contradiction, that the nearer ships cruise to Genoa the more certain is the escape of vessels from that port or their entrance into it assured. I am blockading Genoa according to the orders of the admiralty and in the way I think most proper. Whether modern law or ancient law makes my mode right I can not judge; and surely of the mode of disposing of a fleet I must, if I am fit for my post, be a better judge than any landsman, however learned he may appear.[1]

This is nautical common sense, and is in accord with our practice and instructions.

Empirical rules prescribing the number of vessels, their anchorages, situations, etc., as made by some continental powers, are not practical, and have no connection with either intelligent practice or the hard facts of sea blockades.

Section 63.—Breach of Blockade.

A breach of blockade is not an offense against the laws of the country of the neutral owner or master. The only penalty for engaging in such trade is the liability to capture and condemnation by the belligerent. The use of the terms lawful or unlawful, innocent or noxious, in connection with neutral trade, has reference to the rights of the belligerent blockading State only, and to the liability of the neutral vessel concerned to capture or condemnation.

The acts which constitute a breach of blockade vary with the circumstances of the blockade and the time of occurrence. There is a difference also as to the usage of the different nations, the usage of the French being different from that of the English and Americans. As by far the greatest experience in blockades of late years has occurred to England and the United States, and as their courts have adopted virtually the same rules in dealing with violations of blockades, these rules will be followed in this work.

Halleck says:

> An actual entrance into a blockaded port is by no means necessary to render a neutral ship guilty of violation of the blockade. Indeed, such a construction

[1] Mahan's Life of Nelson.

would essentially defeat the very object of a blockade, by rendering the capture of a ship lawful only after such capture had ceased to be possible. Hence, it is universally held that an attempt to enter the port, knowing it to be blockaded, completes the offense to which the penalty of the law is attached. It is the attempt to commit the offense, which, in the judgment of the law, constitutes the crime, and is as much a breach of neutrality as an actual entrance into the prohibited port. It would be absurd to say that the penalty is not incurred till the unlawful design is fully accomplished, for the offender would, in most cases, be placed by its accomplishment beyond the reach of the law. Nor is the word "attempt" to be understood in a literal and narrow sense. It is not limited to the conduct of the ship at the mouth of the blockaded port, but is applicable to her whole conduct from the moment she has knowledge of the existence of the blockade and the consequent prohibition of neutral commerce. If she has this knowledge before she begins her voyage, the offense is complete the moment she quits her port of departure: if that knowledge is communicated to her during the voyage, the continued prosecution involves the crime and justifies the penalty; if it is not given to her until she reaches the blockading squadron, she must immediately retire or she is made liable to confiscation. It is not the mere mental intention that the law punishes, but it is the overt act by which the execution of an unlawful intent is begun. This overt act is the starting for, or proceeding toward, the prohibited port with the knowledge that it is blockaded.

The general rule thus given by Halleck has some exceptions. If a vessel sails from a distant country, she may clear provisionally for the blockaded port, and be exempt from the penalty of a breach of blockade if it be clearly and unmistakably shown that she was to go to an alternative destination in case it was ascertained by inquiry during the voyage that the blockade was still in force.

An inquiry at the blockaded port is only justifiable when the master of the vessel is ignorant of the existence of the blockade.

Sir William Scott says:

> A neutral merchant has no right to speculate on the greater or less probability of the termination of a blockade and, on such speculation, to send his vessel to the very mouth of the blockaded river or port, with instructions to enter if no blockading force appeared, otherwise to demand a warning and proceed to a different port. A rule that would permit this would be introductory of the greatest frauds.

Entering a blockaded port is of course a breach of blockade. If a neutral ship go in with a cargo, it is presumed that she goes in to deliver it. If the entry is made without a cargo, the presumption is that she goes in to obtain one. If she comes out as she went in, the presumption of an intention to violate the blockade still remains.

A license from the government of the blockading nation is a sufficient justification to enter a blockaded port. A vessel in such a condition of distress as to require the safety and resources of the blockaded port may enter without violation of the blockade. But this necessity must be, Mr. Duer says in his work on insurance, "evident, immediate, pressing, and from its nature not capable of removal by any other means than by the course she had adopted."

As a rule, the act of egress during a blockade is a violation of blockade. This rule does not extend to a neutral vessel found in port when the blockade was first established, nor does it prevent egress to such a vessel with the cargo purchased in good faith and taken on board before the commencement of the blockade. But if even a portion of the cargo is taken on board after the establishment of the blockade is known the act is considered as a breach of blockade and justifies its penalty.

There are several other cases wherein the egress of a neutral vessel from the blockaded port is permitted. She may come out when the port was sought by reason of immediate distress or when for any reason she has the permission of the blockader to enter. Again, if it

should happen that there is a well-founded expectation that the State to which the neutral vessel belongs is about to go to war with the State to which the blockaded port belongs the vessel may be allowed egress.

The time allowed for the egress of a ship in a blockaded port is generally fifteen days after the establishment of the blockade. Special circumstances may call for an extension of time, as when a river of great length is blockaded at its mouth, or as in the case of New Orleans in 1861, when the very low water on the bar led the commanding officer of the blockading vessels to extend the period for vessels of deep draft.

The transport of goods through the mouth of a river under blockade by lighters or small vessels for the purpose of transfer and shipment for exportation by means of an outside vessel makes the latter vessel subject to capture and condemnation. If the vessel is in a port not blockaded and delivers or receives her cargo to or from a blockaded port by interior navigation or other transport, the blockade is not violated. In regard to the return voyage from the blockaded port Wheaton says:

> The offense incurred by the breach of blockade generally remains during the voyage, but the offense never travels with the vessel farther than to the end of the return voyage; although if she is taken during any part of that voyage she is taken in delicto. This is deemed reasonable, because no other opportunity is afforded to the belligerent cruisers to vindicate the offended law. But where the blockade has been raised between the time of sailing and capture, the penalty does not attach: because, the blockade being gone, the necessity for applying the penalty to prevent further transgression no longer exists. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer in delicto. The delictum may have been completed at one period, but it is by subsequent events done away.

If a belligerent captures or recovers a blockaded port, then the blockade is held to cease, as the belligerent can cause the trade of the port to be stopped by municipal regulations. After the capture of the blockaded port any neutral vessel bound to that port becomes innocent and not liable to capture.

In some cases of blockade, mail steamers have been allowed immunity from the operations of the blockade, provided they gave pledges against carrying contraband of war. During the war against Mexico the United States blockading squadron allowed British mail steamers to enter and leave the port of Vera Cruz. During the blockades on the coast of South America it has been generally the custom to allow the mail steamers to continue their regular service under the condition that they were not to carry any contraband of war.

Mr. Wheaton, in a letter to Mr. Buchanan in 1846, said that neutral vessels of war have no privilege against blockade; and the fact that they can not be searched gives the blockading power the more right to require them to keep clear of the lines of the blockade. But the custom has been, as a matter of courtesy, to permit free egress and ingress to neutral men-of-war. During our civil war this was allowed by special orders from the Federal Government, and the privilege was extended to allow them to carry official dispatches, not only for their own Government, but for other friendly Governments.

Usage permits, upon request, this entry on the part of a neutral man-of-war, and unless it interferes with the military or naval operations there seems to be no good reason to forbid it. Our own usage has almost invariably been in favor of this entry both to others and for ourselves, but it can not be said to have become more than an

act of courtesy, subject to refusal in case of an abuse of the privilege, from military necessity, or a doubt as to the character of the applying vessel. (See Appendix 7.)

The crews of blockade runners are not enemies and should not be treated as prisoners of war, but with due consideration. Any of the officers or men whose testimony is desired before the prize court can, and should, be detained as witnesses.

The Revised Statutes of the United States bearing upon this subject are found in various sections, ranging from 4613 to 5441, and also articles 15, 16, and 17 of the Laws for the Government of the Navy of the United States. Says Chancellor Kent:

> The consequence of a breach of blockade is the confiscation of the ship, and the cargo is always *prima facie* implicated in the guilt of the owner or master of the ship, with whom it lies to remove the presumption that the vessel was going in for the benefit of the cargo and with the direction of the owner. Where, therefore, as in the case of the *Mercurius*, it may appear that the shippers at the time of the shipment could not have known of the blockade, though the ship be condemned, the cargo will be restored; but when at the time of the shipment the blockade either is or might be known to the owners of the cargo, who may therefore possibly be aware of an intention of violating the blockade, they will be considered as included by the illegal act of the master, although done without their privity or perhaps contrary to their wishes.

Section 65.—Continuous Voyages.

Applied to the colonial and coasting trade.—By the rule of the war of 1756 neutrals were not permitted to engage in the direct trade between the enemy and his colonies. When in order to avoid this rule the neutral carrier touched at a neutral port, either of his own country or of another neutral State, it was decided by Lord Stowell, and the principle extended by Sir William Grant in the case of the *William* in 1806, that the vessel was still subject to condemnation. In this way the doctrine of continuous voyages was declared and made applicable to the colonial and by analogy to the coasting trade of the belligerent.

In the case of the *William*, the vessel arrived at Marblehead, Mass., from La Guayra on the 29th of May. On the 30th and 31st the goods were landed, weighed, and packed, and on the 1st of June the permit to reship them was obtained, and on the 3d of June the vessel was cleared for a Spanish port, La Guayra then being in a Spanish colony.

In this, as in all cases of continuous voyages, the intention is the controlling factor, and nothing was alleged to have happened between the landing of the cargo and its reshipment that could have had any effect upon the determination of the destination.

The landing of the goods was held not to be a true importation into the United States, because it was admittedly done with the intention of immediate reshipment. The whole transport from La Guayra to Spain was therefore held to be a single continuous voyage.

This doctrine of continuous voyages, applied by the British courts, resulted adversely to certain American interests. When in turn it was adopted and somewhat extended by American courts during our civil war it bore severely on certain interests and adventures of English vessels.

Applied to the carriage of contraband and to the breach of blockade.—At the time just mentioned the rule of continuous voyages became the settled practice of the American prize courts. The leading cases under which that doctrine was enunciated were those of the *Bermuda*, the *Stephen Hart*, the *Peterhoff*, and the *Springbok*. This doctrine has not been accepted by all continental publicists, and in

the case of the *Springbok*, particularly, there has been dissent by some leading English and American writers. The latter vessel was captured while, at least in form, on a voyage from England to the English colonial port of Nassau, New Providence. The question of her liability to capture having been decided adversely to her neutral owners by our highest court, appeal was made to the English Government for a diplomatic settlement. The English Government referred the matter to its law officers, and the owner of the goods also obtained legal opinions. Sir Robert Phillimore, Sir Roundell Palmer, Sir Vernon Harcourt were among those consulted. The opinions given concur with the judgment of the Supreme Court, that the point upon which the question must turn was that of the original destination of the cargo. If they were intended to be sold at the neutral port of Nassau, to which the *Springbok* was bound, the goods would not be liable to seizure. But if it were originally intended that the goods should go beyond Nassau, and the voyage of the *Springbok* was in part fulfillment of that original design, then they were liable to capture.

The English lawyers, in reviewing the reasons given by the condemning court for holding this latter view, expressed the belief that these reasons were partly founded on mistake and partly consisted of erroneous deduction. A claim for compensation was then preferred, under the auspices of the British Government, by the owners of the cargo before the international commission created to investigate this and numerous other claims. The commission was composed of an English and American member, and was presided over by Count Corti, then minister of Italy at Washington, afterwards Italian minister of foreign affairs. This commission unanimously rejected the claim and sustained the decision of the Supreme Court of the United States, but without giving the reasons for its decision.

There seems to be but little question that the evidence as to the destination of the cargo should be definite. A presumption should not be sufficient. In the case of the *Springbok*, although only about one per cent of the cargo could be held as contraband, yet of that proportion there was no doubt as to its character. A review of this case, and incidentally of the question of continuous voyages, was made in 1878 by Hon. J. C. Bancroft Davis, formerly Assistant Secretary of State and later minister to Berlin, as a reply to a paper by Sir Travers Twiss. This review answers the criticisms and objections raised by that learned writer.[1]

Judge Betts, in the case of the *Stephen Hart*, as previously remarked, gives the best statement of the doctrine. After holding that the mere touching at a neutral port, or even a transshipment, does not break the voyage if the intention on sailing was to carry contraband or break the blockade, he goes on to say:

> The principles upon which the Government of the United States and the public vessels acting under its commission have proceeded during the present war in arresting vessels and cargoes as lawful prize upon the high seas are very succinctly embodied in the instructions issued by the Navy Department on the 18th of August, 1862, to the naval commanders of the United States. These instructions

[1] In "Les Tribunaux de Prises des États-Unis," the title of the memoir referred to, Mr. Davis says: "L'examen des colis portés sur les connaissements Nos. 3 et 4 y a fait découvrir des couvertures grises et blanches à l'usage de l'armée, des boutons de marine marqués C. S. N. (Confederate States Navy), des boutons pour soldats, marqués A (artillerie), I (infanterie), et C (cavalerie), tous portant au côté l'estampille de 'Isaac Campbell & Co.' Il y avait aussi quelques sabres de cavalerie, des baïonettes," etc., etc.

are therein declared to be a recapitulation of those theretofore from time to time given. The substance of them, so far as they are applicable to the present case, is that a vessel is not to be seized without a search carefully made so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents and to their ports, directly or indirectly, by transshipment, or otherwise violating the blockade.

The main feature of these instructions, so far as they bear upon the questions involved in the case, is but an application of the doctrine in regard to captures laid down by the Government of the United States at a very early day. In an ordinance of the Congress of the Confederation, which went into effect on the 1st of February, 1782 (5 Wheaton App., p. 120), it was declared to be lawful to capture and obtain condemnation of all "contraband goods, wares, and merchandise, to whatever nations belonging, although found in a neutral bottom, if destined for the use of the enemy."

In his introduction to the Manual of Naval Prize Law, drawn up for the use of officers of the British navy in 1866, Mr. Godfrey Lushington says:

Connected with the subject of contraband is the important question of the mode of ascertaining the destination of goods on board a vessel. In this volume it has been treated as conclusively determined by the destination of the vessel. This view is clearly to the interest of the neutrals. On the other hand, the interest of the belligerent when endeavoring to intercept contraband goods from going to the enemy, is to look beyond the destination of the vessel to the destination of the goods. * * * Judged by principle, the view of the belligerent seems correct. A neutral vessel which forwards munitions of war part of their way to their ultimate destination to one of the belligerents is really aiding and abetting in the war, and this on the high seas. This view is maintained by Halleck, Duer, and Historicus, and was enforced by the American courts in the cases of the *Stephen Hart* and the *Commercen*.

But the decisions of the British courts, so far as they extend, have been in the opposite direction. The view of the neutral was supported in the case of the *Hendric* and the *Alida*, and more recently in the case of Hobbs *v.* Henning. As to the last case, however, it is to be observed that the judgment of the court of common pleas was only upon the proceedings, and apparently rests on no other authority than that of Ortolan, an avowed advocate of neutral rights, on an abstract theory which is indifferent alike to positive decisions and general practice.

Sir Edward Creasy, in a long discussion of the matter, says:

In the administration of all law, international as well as municipal, realties and not shams are to be regarded. The artifice which is in fraud of a law is itself a breach of that law. Unquestionably there ought to be very full and clear proof of such artifice being practiced as well as planned. The burden of proof necessarily lies on the captors, who impute liability to seizure. Nay, more, the neutral destination of the ship ought to be looked on as a presumptive proof of the neutral destination of the cargo; and the evidence on behalf of the captors to outweigh such presumption ought to be very different in quality and amount from what it was held sufficient in the case of the *Springbok*. But if full and clear evidence is adduced that the contraband goods are not destined for sale and consumption in the neutral market, but that the direct and primary object of their shipment was to forward them to or toward the enemy, then the belligerent against whom they were destined to be used has a right to protect himself by arresting and seizing the intended instruments of ill to him while they are on the seas, which are the highways of all nations but the territories of none.

Mr. Bancroft Davis, in his memoir, takes the ground that the doctrine of continuous voyages, although opposed by various continental publicists, is one held by the English and American courts; that is to say, by the courts of the principal maritime powers of the world, and hence, that this doctrine can not justly be regarded as one imposing special and onerous restrictions upon neutral commerce. The fact that the United States have been a defender of neutral rights in the past does not require them to advocate and justify a fictitious neutrality. In the case of the *Springbok* not only has the Supreme Court of the

United States sustained the doctrine, but its decision has been maintained by the international tribunal to which final appeal was taken.[1]

This doctrine was not promulgated in the war with Spain, and circumstances did not cause any case of this nature to come to trial or adjudication. The latest English writer, Dr. Macdonell, on the rights and duties of belligerents and neutrals speaks of this question as follows:

It must be conceded that but for the theory of continuous voyages blockaders may be easily evaded in these days of developed railway communications. None the less is a new chain on neutral commerce forged by those decisions.

In the case of the *Doelwijk*, in the late hostilities between Italy and Abyssinia, the question is discussed in favor of the doctrine of continuous or indirect voyages, by Mr. Prosper Fedozzi, in No. 1, volume 29, of Revue de Droit International for 1897. Mr. Fedozzi asserts the opinion that the theory of continuous voyages is accepted by a majority of the best publicists.

In 1896 the Institute of International Law, at a meeting in Venice, after discussion, adopted the following declaration:

1. Sont contrebandes de guerre, les munitions de guerre, ainsi que les instruments spécialement fait pour les fabriquer, transportées par mer pour le compte ou à destination d'un ennemi.

La destination pour l'ennemi est présumé, lorsque le transport va à un de ses ports, ou bien à un port neutre qui d'après des preuvés évidentes et de fait incontestables. n'est qu'une étape pour l'ennemi comme but final de la même opération commerciale.

Section 66.—Right of Search.

The right of visit and search a belligerent right.—Sir William Scott, in his decision in the *Maris* case, speaks of the right of search as follows·

The right of visiting and searching a merchant ship upon the seas—whatever be the ships, whatever be the cargoes, whatever be the destination—is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destination are, and it is for the purpose of ascertaining these facts that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured it is impossible to capture. * * * The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible, but soften it as much as you can, it is still a right of force,

[1] The original text reads: "Ne pouvons nous pas logiquement conclure que les règles de conduite internationale sanctionnés depuis tant d'années par les deux principales puissances maritimes du monde ont en elles quelque chose qui s'adresse à ce sens commun élevé et qu'elles ne doivent pas être regardées exclusivement comme des restrictions onéreuses imposées au commerce neutre? * * * J'ai confiance que le jour est encore éloigné où les États-Unis cesseront d'être au premier rang parmi les défenseurs des droits des neutres de bonne foi. Le jour est encore plus éloigné où l'Amérique se fera le défenseur et le soutien d'une neutralité fictive. Dans votre mémoires vous parlez des la fiction de la continuité du voyage. Qu'il me soit permis de penser que cette expression est plutót applicable à la neutralité des parties qu'aux voyages qu'elles projettent et qu'elles entreprennent. Quand on se rappelle que le *Bermuda* a été condamné comme un vaisseau ennemi et n'a pas appelé de ce jugement, et que la décision de la plus haute cour nationale d'appel, qui a condamné le *Springbok*, a été maintenue en appel devant un tribunal international, on ne peut s'empêcher de croire que c'est abuser du mot 'neutre' que de l'appliquer à ces parties." (Pp. 26, 27, Les Tribunaux de Prises des États-Unis, par J. C. Bancroft Davis.)

though of lawful force in something of the nature of civil process when force is employed, but a lawful force which can not be lawfully resisted.

In regard to the extent of this right of search, Dr. Woolsey says:

In the first place, it is only a war right. The single exception of this is that a nation may lawfully send a cruiser in pursuit of a vessel which has left its port under suspicion of having committed a fraud upon its revenue laws or some other crime. This is merely a continuation of a pursuit beyond the limits of maritime jurisdiction with the examination conducted outside these bounds, which, but for the flight of the ship, might have been conducted within. In the second place, it is applicable to merchant ships alone. Vessels of war, pertaining to the neutral, are exempt from its exercise, both because they are not wont to convey goods and because they are, as a part of the power of the State, entitled to confidence and respect. If a neutral State allowed or required its armed vessels to engage in an unlawful trade, the remedy would have to be applied to the State itself. To this we must add that a vessel in ignorance of the public character of another—for instance, suspecting it to be a piratical ship—may without guilt require it to lie to, but the moment the mistake is discovered all proceedings must cease. In the third place, the right of search must be exerted in such a way as to attain its object and nothing more. Any injury done to the vessel or its cargo, any oppressive or insulting conduct during the search, may be good grounds for a suit in the court to which the cruiser is amenable, or even for interference on the part of the neutral State to which the vessel belongs.

The right of search in war time can be exercised in the territory of both belligerents or upon the high seas. But the right of search and visit can not be exercised in places where hostilities are forbidden, that is, within the territory of neutrals or within the territory of powers allied to the searching belligerent, without their consent.

The right of search can only be exercised by regular commissioned vessels provided with authority as such by the Government of the State.

The usual method of summoning a vessel for the purpose of examination and search is by hoisting the national ensign and firing a blank charge, which is known as the affirming gun. The neutral vessel may also be summoned by signals or by hailing through the speaking trumpet. It is the duty of the neutral vessel to obey such summons by heaving to, to allow boarding, at the same time displaying her national colors. The summons must be made in some form, otherwise there can be no blame attached to a neutral ship for not heaving to, and further steps in the way of firing a shotted gun can not be made unless the preliminary summons be disregarded. The distance of the boarding vessel should be a convenient one, and the old rule of cannon-shot distance can no longer be followed. Resistance to search made against a lawful cruiser subjects the vessel in time of war to confiscation. The resistance of the neutral vessel can not be justified or excused by any order from the sovereign power of the State, as international law does not permit a neutral State to interfere with the legal rights of the belligerent.

The following are the paragraphs bearing upon the right and method of search in the instructions of the Navy Department to blockading vessels and cruisers:

12. The belligerent right of search may be exercised without previous notice, upon all neutral vessels after the beginning of war to determine their nationality, the character of their cargo, and the ports between which they are trading.

13. This right should be exercised with tact and consideration and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations, wherever they exist: After firing a blank charge and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whaleboat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons.

The officer, wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is a neutral and trading between neutral ports, the examination goes no further. If she is neutral and bound to the enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war the vessel should be seized; if not, she should be set free, unless by reason of strong grounds of suspicion, a further search should seem to be requisite.

Search of neutral ships under convoy.—This brings us to the much-debated question whether neutral vessels convoyed by their own vessels of war have a right in war time to resist visitation and search. Most of the recent continental publicists maintain that neutral vessels, under such circumstances, are exempt from search. English writers, following the lead of Sir William Scott, maintain that the right to visit and search merchantmen is not affected by convoy, notwithstanding assurances on the part of the convoying men-of-war that the vessels of the convoy are free from fraudulent intent or taint of contraband.

The policy of the United States has been to favor the rule of exemption, and this principle has been introduced into thirteen of the treaties made with other States, the last being with Italy in 1871.

France has made similar conditions in six treaties, while Germany, Austria, Spain, and Italy, in addition to the Baltic powers, provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain stands alone. Many of our publicists hold views not unlike those of England, but in view of the policy of the United States as shown in its treaty stipulations and the concurrent view of almost all of the great powers it is most probable that our practice in future wars will conform to that enunciated in the Regulations of the Navy for 1876, which instruct officers in command of convoying ships not to permit ships under their protection to be searched or detained by any belligerent or other cruiser, but to be satisfied also that no contraband is being carried to a belligerent port, and to be acquainted with all particulars as to the nationality and ownership of the vessels of the convoy.

The question whether neutral vessels who place themselves under the convoy of a belligerent cruiser are liable to capture and confiscation has also been much discussed. The lords of appeal in England decided that sailing under the convoy of an enemy was sufficient and conclusive grounds for condemnation. Mr. Wheaton maintained that though it might be considered presumptive evidence it could not be regarded as conclusive evidence. The weight of opinion favors the doctrine that such acts are sufficient to condemn the vessel joining a belligerent convoy.

The right of a belligerent to visit and search neutral vessels carries with it the right to demand and examine the ship's papers. Chancellor Kent says on this point:

A neutral is bound not only to submit to the search, but to have his vessel duly furnished with genuine documents requisite to support her neutral character. The most material of these documents are the register, passport or sea letter,[1] muster roll, log book, charter party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of any one of them is not absolutely conclusive. * * *

The concealment of papers material for the preservation of the neutral character justifies a capture and carrying it into port for adjudication, though it does not actually require a condemnation.

[1] Not now required by vessels of the United States.

The destruction or spoliation of papers is a still more suspicious circumstance, and in most countries would be sufficient in itself to exclude further proof and condemn the vessel; but it does not in England create an absolute presumption juris et de jure. The Supreme Court of the United States has followed the English rule and held that spoliation of papers was a circumstance open to explanation.

False papers when intended expressly to deceive the belligerent by whom the capture is made, and which if accepted as genuine would clear the vessel from any taint, are sufficient cause for condemnation.

A neutral vessel, in general terms, is liable to seizure:

1. In case of an attempt to avoid search, by escape; but this must be clear and evident.
2. In case search is resisted by violence.
3. In case of false or fraudulent papers.
4. In case of the absence of the necessary papers.
5. When papers are destroyed, mutilated, or hidden.

The captured vessel must be sent in for adjudication as soon as possible. If improper delay should occur demurrage is allowed. Neutral property can only be transferred and condemned by proper courts and trial, so it is not proper to destroy it. If a neutral vessel can not be brought into port for adjudication it should be released.

Due care should be exercised to preserve the vessel and its cargo from loss or damage; but loss by unavoidable perils of sea will not require compensation or penalty. Compensation, however, is awarded in case of loss or injuries from a want of proper care or assistance on the part of the captor.

The right of search in time of peace as applied to piracy and the slave trade—The right of approach.—The right of seizure beyond the 3-mile limit for a violation of municipal law, which has already been discussed, is, as Woolsey says:

> An incident of sovereignty in a state of peace, but is confined in its exercise to a small range of the sea. The right of search on suspicion of piracy, however, is a war right, and may be exercised by public vessels anywhere except in the waters of another State, because pirates are enemies of the human race, at war with all mankind.

Vessels suspected of piracy can, then, be detained in time of peace, but if detained with insufficient grounds there is a possibility of a claim for damages.

The State has no right to direct its public vessels to visit and search vessels of other States upon suspicion of being engaged in the slave trade without special treaty arrangements. The slave trade not being piracy by the law of nations, but only by municipal and conventional law, the right of search is not conceded to foreign vessels except by agreement.

The question of the search and visit of American vessels for the impressment of seamen can be considered as closed by Mr. Webster's communication to Lord Ashburton in 1842. In it he says:

> The American Government, then, is prepared to say that the practice of impressing seamen from American vessels can not be allowed to take place. That practice is founded on principles which it does not recognize and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude as can not be submitted to.

In the case of the *Mariana Flora* the Supreme Court of the United States declared that ships of war, properly commissioned, had the

right to approach merchantmen or other vessels in time of peace upon the high seas for the purpose of observation.

This, however, has never been supposed to draw after it any right of visitation or search. The right of approach is for the sole purpose of ascertaining the real nationality of the vessel sailing under suspicious circumstances.

Secretary Cass, in his dispatch to Lord Lyons of date of May 12, 1859, stated that the United States Government concurred with those of Great Britain and France as to the propriety of an exhibition of her flag by every merchantman on the ocean whenever she meets a ship of war, either of her own or any foreign nation; that in reference to the friendly approach to a suspicious vessel no objection could exist, but those vessels so approached could not be bound to lie to or await the approach.

Chapter XII.

Capture in Maritime War; Prize Courts.

Section 67.—The Declaration of Paris; Immunity of Enemy's Property in Neutral Vessels.

The Declaration of Paris, signed April 16, 1856, consists of an agreement or declaration as to the following four articles, viz:

(1) Privateering is and remains abolished.
(2) The neutral flag covers enemy's goods, with the exception of contraband of war.
(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
(4) Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

At the outbreak of our civil war the United States made it known to the maritime powers of Europe that they were ready to adopt the second, third, and fourth articles of the declaration, and that, though they preferred them with the amendment proposed by Mr. Marcy exempting private property from capture at sea, and without the first article, they were willing to adopt them as they stood. Their offer was declined by Great Britain and France, who desired to make special restrictions and exceptions applying to the civil war and the Confederates.

Notwithstanding this, the United States made known their intention to follow the second, third, and fourth rules of the declaration during the civil war. As the Executive policy was likely to be at variance with the judicial precedents, it was thought that the latter would come in conflict with the tenets of the second article. The Executive has control of such matters, however, by instructions to the Navy as to the capture of neutral vessels, and also by ordering restitution if such capture should have occurred before adjudication is had. As a matter of fact, no case is reported to have happened of a condemnation in opposition of either the second or third articles of the Declaration of Paris during the civil war.

In the proclamation issued by the President of the United States at the outbreak of the war with Spain, and dated April 26, 1898, he states that the policy of the Government of the United States will be to adhere to the rules of the Declaration of Paris, and he proclaimed that the neutral flag would be held to cover enemy's goods, with the exception of contraband of war. This adherence on the part of the United States to the Declaration of Paris, added to the assent of Spain to the Declaration with the exception of a reservation as to privateering, gives an additional weight to that important manifesto, and makes what may be almost considered a rule of international law of the second article of the Declaration, with respect to the immunity of the property of an enemy under a neutral flag, except as to contraband of war.

In the treaty between Italy and the United States, in 1871, this principle of free ships and free goods was not only affirmed, but it

was agreed to exempt all private property of the two countries from capture in case of maritime war existing between them, with the exception of contraband of war or of the case of violation of blockade.

Section 68.—Exemption of Neutral Goods in Enemy's Ships.

This question of whether the innocent goods of a neutral can be transported in a belligerent vessel without exposure to confiscation upon capture of the belligerent vessel was a subject of much discussion until the adoption of the third article of the Declaration of Paris practically settled the question. This provides that neutral goods are not liable to capture afloat when under enemy's flag, with the exception always of contraband of war.

Chief Justice Marshall, in the case of the *Nereide*, delivered the opinion of the majority of the Supreme Court of the United States:

> A neutral merchant has a right to charter and lade his goods on board a belligerent armed vessel without forfeiting his neutral character. * * * That a neutral may lawfully place his goods on board a belligerent vessel for conveyance on the ocean is universally recognized as the original law of nations.

In the words of Sir Travers Twiss:

> This opinion is entitled to great weight, not merely from the authority which attaches to the opinion of that eminent judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded.

The almost universal acceptance of the Declaration of Paris upon this point, and the announced policy of the United States as well as its acceptance of the Declaration of Paris, practically establishes this usage and principle for the maritime world.

In 1872 the French prize court gave a decision as to neutral goods on board of two German ships which had been captured and destroyed in the war of 1870–71. It was decided that, though under the terms of the Declaration of Paris neutral goods on board an enemy's vessel can not be seized, it only follows that the neutral whose goods are so embarked can claim restitution of his merchandise, or, in case of its sale, the proceeds of its sale; but that an indemnity can not be claimed for any destruction or loss by acts of war which may accompany or follow its capture. Hall says:

> It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might, under some circumstances, amount to an indirect repudiation of the Declaration of Paris. In the case, for example, of a State, the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy, instead of bringing in for condemnation, would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the declaration in question. * * * It ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize courts, and not merely to allege, that he has acted under the pressure of a real military necessity.

Section 69.—Prizes and Prize Courts.

The courts of the United States which take cognizance of maritime capture are the district courts, the circuit courts, and the Supreme Court.

The district courts have exclusive original cognizance of all civil causes of admiralty, and maintain jurisdiction within certain limitations as to the tonnage of the vessels. They have also jurisdiction concurrently with the circuit and State courts of causes where an

alien sues for an injury suffered in violation of international law or a treaty of the United States.

They possess all the powers of a prize court and have cognizance of complaints by whomsoever instituted in cases of captures made within the United States.

In prize cases appeals from the final decrees of the district court may be carried direct to the Supreme Court of the United States. On the other hand, appeals in admiralty cases go to the circuit court of appeals, whose judgment is final.[1]

The prize courts of the other powers vary in jurisdiction and constitution. No civilized State which has a commercial or an armed navy is without such court. There are different methods of procedure in the various States, but the general principles of law, and the rules as to evidence, etc., are as a general rule very much the same.

The rules of international law recognized by the authorities of the United States are those admitted by common custom at the period when the United States became independent, except when modified by treaty. And the practice of our prize courts, which are the real expounders of the law, conforms to that of the British courts, except when modified by treaty.

The Supreme Court of the United States declared, in the decision of the cases growing out of the war of 1812, that as the United States was at one time a component part of the British Empire, the prize law of that country was, as understood at the time of the separation from the mother country, the prize law of the United States. But the rules later adopted by England are entitled to no more authority in our courts than those of other countries. Beach Lawrence says:

> The constitution of prize courts is an anomaly in jurisprudence. Deriving their authority from one nation, they pass irrevocably on the property belonging to the citizens or subjects of another. Tribunals exclusively of the belligerents. they pronounce on the rights of neutrals, who have no other appeal from the admiralty courts in the last resort than to the justice of the sovereign of the captor, through the diplomatic interposition of their own government.

Of late there has been an opinion among some publicists, which has arisen after much discussion, in favor of having prize courts organized upon an international basis. Dr. McDonnel, in a recent lecture before the Royal United Service Institution, in London, says as to this question:

> That the prize court should be always the court of the belligerent State; that the nation which has seized the property of neutrals, or is interested in condemning it, should give a decision binding their property and rights; that neutrals should have no voice in the matter—that also is an anomaly, but one too deeply rooted to be removed in our time.

The instructions of the Navy Department require that prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

By the law of nations there is an established method for determining whether the capture be or be not a legal prize. Capture alone does not transfer any right of property in the vessel or cargo to the captors; the title remains unchanged until a regular sentence of condemnation is given by some competent prize court after a regular trial wherein both parties can be heard.

The competent and proper prize court for such condemnation is, under present usage, a court of that State to which the captor belongs.

If the captured vessel or any part of her cargo is not in fit condition

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[1] Act of March 3, 1891.

to be sent in for adjudication, the laws of the United States provide for an appraisement and sale, and deposit of the proceeds to the order of the prize court in which proceedings are to take place.

In case any captured vessel or property is taken for the use of the United States before it comes into the custody of a prize court it must be surveyed, appraised, and inventoried, and the results sent to the prize court in which proceedings are to take place, and the department of the government for whose use it has been appropriated must deposit the value thereof subject to the order of the court in the cause. The British Government objected to this law during our civil war.

Dana says:

> Necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or there is impending danger of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence in the way of papers and persons on board. And even if nothing of pecuniary value is saved it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his government and for the satisfaction of neutrals. In the case of the *Trent*, the reason assigned by Captain Wilkes for not sending in his prize was the great inconvenience that would result to the numerous passengers on board and to the commercial world, as there were mails on board for all parts of Europe which would have to be subjected to delay. This motive, though creditable to the commander in that case, is not recognized by the law of nations as an excuse.

If damage happens to the vessel or cargo while in the hands of the captors, and the court holds the capture to have been made on probable grounds, the responsiblity of the captor is only for a failure to use reasonable care and skill.

In the instructions of the Navy Department it is required that the prize should be delivered to the custody of the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of her seizure and kept in the custody of the prize master. When circumstances permit, it is recommended that the officer making the search of the prize should also be made prize master.

The papers, including the log book of the prize, should be delivered to the prize commissioners, the witnesses to the custody of the marshal of the United States, and the prize remain in the custody of the prize master until the court issues process directing one of its own officers to take charge.

If, for any controlling reason, the ship is not sent in for adjudication, such as unseaworthiness, infectious disease, lack of a prize crew, or danger of recapture, the prize may be destroyed or it may be appraised and sold. In all such cases, however, all the papers and other testimony should be sent to the prize court, in order that a decree may be entered in the case.

Article 16, for the government of the Navy of the United States, prohibits the taking out of a prize any money, plate, goods, or any part of her equipment, unless for better preservation, or unless such articles are absolutely needed for the use of vessels or the armed forces of the United States. Article 17 of the same provides punishment for the pillage or maltreatment of any persons found on board a prize.

In sections 1624, 4615, 4616, 4617, and 5441 of the Revised Statutes of the United States are found the instructions as to procedure in case of the capture of a prize, including its conveyance home and the delivery to the prize court.

APPENDIX 1.

Documents and Papers Carried by Vessels of the United States.

Evidence of nationality:

- Permanent register for vessels engaged in foreign trade. (Granted by collectors to vessels of their districts.)
- Temporary register for vessels engaged in foreign trade. (Granted by collectors to vessels not of their districts.) (*See* Forms (Catalogue No. 534), p. 10, Customs Regulations.)
- Permanent enrollment for vessels engaged in coasting trade. (Granted as above.)
- Temporary enrollment for vessels engaged in coasting trade. (Granted as above.) (*See* Forms (Catalogue No. 538), p. 15, Customs Regulations.)
- Permanent license for vessels engaged in fisheries. (Granted as above.)
- Temporary license for vessels engaged in fisheries. (Granted as above.)
- Licenses to yachts.
- Commissions to licensed yachts for cruising abroad.

Other papers that may be used as evidence of nationality:

- Shipping articles.
- Crew list. (*See* Customs Regulations, p. 68.)

Evidence of nationality of foreign-built vessels owned by citizens of the United States entitled to carry the flag and to legal protection, but not documented vessels of the United States:

- Certificate of ownership, and also as to the validity and filing of the bill of sale. (Issued by the collector of port or United States consul.)

Other papers carried:

- Permit for fishing vessel to touch or trade at a foreign place. (*See* Customs Regulations, p. 75.)
- Passenger list.
- Manifest of cargo, foreign or coasting. (*See* Customs Regulations, pp. 53, 66, 73.)
- Clearance. (*See* Customs Regulations, pp. 70, 74.)
- Bills of lading.
- Ship's log book.
- Bill of health.

Commercial intercourse with the guano islands under the jurisdiction of the United States is a part of the coasting trade. Vessels engaged in this guano trade are not required to produce clearances or certified manifests.

The tonnage of a vessel, besides being shown upon her certificate of registry, etc., is marked upon the face of the beam under the forward side of the main hatch of seagoing vessels.

APPENDIX 2.

Papers Carried by Vessels in Evidence of Their Nationality, and Other Papers Which Ought to be Found on Board.

[From Hall's International Law, p. 753, 3d ed.]

AUSTRIA.

Papers evidencing nationality:

Patente sovrana (royal license).

Scontrino ministeriale (certificate of registry).

Other papers carried:

Giornale di navigazione (official log book).

Scartafaccio, giornale di navigazione cotidiano (ship's log book).

Ruolo dell' equipaggio (muster roll).

Manifest of cargo and bills of lading.

Charter party, if the vessel is chartered.

BELGIUM.

Lettre de mer (sea letter).

Rôle d'équipages.

Régistre de certificat de jaugeage (certificate of registry).

Log book.

Manifest of cargo.

Les connaissements (bills of lading).

Acte de propriété.

Charter party.

BRAZIL.

Papers evidencing nationality:

Carta de registro (certificate of registry).

Passe especial (special pass) issued to Brazilians out of the Republic by the minister or consul in the foreign country, and constituting provisional proof of nationality.

Other papers carried:

Passport.

Muster roll.

Manifest of cargo.

Bills of lading.

DENMARK.

Papers evidencing nationality:

Registrering certifikat (certificate of nationality and registry).

Provisional certificate of registry issued by governors of possessions abroad. or by consuls.

[The letters D. E. (Dansk Eiendom) burnt into the main beam in the after part of the main hatchway.]

Papers carried other than that above mentioned:

Royal passport, in Latin, with translation, available only for the voyage for which it is issued, unless renewed by attestation.

Certificate of ownership.

Build-brief (certificate of build).

Admeasurement-brief.

Burgher-brief (certificate that the master has burgher rights in some town of the kingdom).

Muster roll.

Charter party, if the vessel is chartered.

FRANCE.

Papers evidencing nationality:
- L'acte de francisation (certificate of nationality).
- Acte de francisation provisoire.

Other papers which must be carried under the provisions of the Code de Commerce:
- Congé (sailing license).
- Le rôle d'équipage.
- L'acte de propriété de navire.
- Les connaissements et chartes-parties.
- Les procès-verbaux de visite.
- Les acquits de paiement ou à caution.
- Manifest of cargo and inventory of ship's fitting and stores.

GERMANY.

Papers evidencing nationality:
- Schiffs certifikat (certificate of nationality).
- Flaggen attest (provisional certificate of nationality).

Other papers carried:
- Messbrief (certificate of measurement).
- Beilbrief (builder's certificate).
- See-pass (sailing license).
- Journal (ship's log book).
- Musterrolle (muster roll).
- Charter party, if the vessel is chartered.

GREAT BRITAIN.

Papers evidencing nationality:
- Certificate of registry, or provisional certificate granted by a consul resident in a foreign country to a vessel brought there. The provisional certificate is good for six months from the date of issue. A pass granted to a vessel before registration, enabling her to go from one British port to another within the British dominions, has also the force of a certificate.

Other papers carried:
- Official log book.
- Ship's log book.
- Shipping articles.
- Muster roll.
- Manifest of cargo.
- Bills of lading.
- Charter party, if the vessel is chartered.

GREECE.

Papers evidencing nationality:
- Certificate of nationality.

Other papers carried:
- Congé or passport.
- Inventory of ship's fittings.
- Certificate of tonnage.
- Muster roll.
- Description of visits to which the ship has been subjected.
- Log book.
- Bill of health.

ITALY.

Papers evidencing nationality:
Alto di nazionalità (certificate of nationality).
Other papers carried:
Giornale di navigazione (official log-book).
Scartafaccio, giornale di navigazione cotidiano (ship's log book).
Ruolo del' equipaggio (muster roll).
Manifest of cargo and bills of lading.
Charter party, if the vessel is chartered.

NETHERLANDS.

Zeebrief (sailing license).
Voorloopige Zeebrief (provisional sailing license).
Buitengevone Zeebrief (extraordinary sailing license).
Bijlbrief (certificate of ownership).
Meetbrief (certificate of tonnage).
Journal (ship's log-book).
Monster-rol (muster roll).
Manifest of cargo and bills of lading.
Charter party, if the vessel is chartered.

NORWAY.

Papers evidencing nationality:
Nationalitetsbreviis (certificate of nationality).
Provisional certificate granted by consul.
Other papers carried:
Bülbrev (certificate of build).
Maalebrev (certificate of measurement). The bülbrev and the maalebrev need not be carried by vessels bought in foreign ports for two years after purchase.
Mandskabliste (muster roll).
Journale (ship's log book).
Manifest of cargo and bills of lading.
Charter party, if the vessel is chartered.

PORTUGAL.

Papers with which a vessel must be provided:
Pasaporte de navigacion.
Acta de propriedad del buque.
Rol.
Conocimientos.
Recibos de fletes y despacho.
A copy of the Code of Commerce.

RUSSIA.

Evidence of nationality:
Patent authorizing the use of the Russian flag.
The fact that the master and half the crew are Russian. [N. B. The patent is not conclusive in itself, because it can be granted, though it is not commonly granted, to foreign ships.]
Papers which must be carried by Russian ships:
The patent above mentioned.
Beilbrief (builder's certificate).
Custom-house passport.

Other papers carried:
Ship's log book.
Muster roll.
Charter party, if the vessel is chartered.

SPAIN.

Papers evidencing nationality:
La patente ó pasaporte de navigacion.
Other papers carried:
El rol del equipage y lista de pasajeros.
Testi·onio de la escritura de propriedad de la nave.
Contrato de fletamento.
Conocimientos, facturas y guias de la carga.

SWEDEN.

A passport from a chief magistrate or commissioner of customs.
Bilbrief (builder's certificate).
Mätebref (certificate of measurement).
Fribref (certificate of registry).
Journalen (ship's log book).
Folkpass or sjömansrubla (muster roll).
Charter party, if the vessel is chartered.

APPENDIX 3.

GENERAL ORDER } NAVY DEPARTMENT,
No. 492. } *Washington, June 20, 1898.*

The following "Instructions to Blockading Vessels and Cruisers," prepared by the Department of State, are published for the information and guidance of the naval service.

JOHN D. LONG, *Secretary.*

INSTRUCTIONS TO BLOCKADING VESSELS AND CRUISERS.

1. Vessels of the United States, while engaged in blockading and cruising service, will be governed by the rules of international law as laid down in the decisions of the courts and in the treaties and manuals furnished by the Navy Department to ships' libraries, and by the provisions of the treaties between the United States and other powers.

The following specific instructions are established for the guidance of officers of the United States:

BLOCKADE.

2. A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous. If the blockading vessels be driven away by stress of weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade—such as chasing a blockade runner—or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of a blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score.

NOTIFICATIONS TO NEUTRALS.

3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the Government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize and should be sent in for adjudication; but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral.

4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free, and should she again attempt to enter the same or any other blockaded port as to which she has had notice, she is good prize.

5. Should it appear from a vessel's clearance that she sailed after notice of blockade had been communicated to the country of her port of departure, or after the fact of blockade had, by a fair assumption, become commonly known at that port, she should be sent in as a prize. There are, however, treaty exceptions to this rule, and these exceptions should be strictly observed.

6. A neutral vessel may sail in good faith for a blockaded port with an alternative destination, to be decided upon by information as to the continuance of the blockade obtained at an intermediate port. But, in such case, she is not allowed to continue her voyage to the blockaded port in alleged quest of information as to the status of the blockade, but must obtain it and decide upon her course before she arrives in suspicious vicinity; and if the blockade has been formally established with due notification, any doubt as to the good faith of such a proceeding should go against the neutral and subject her to seizure.

7. In accordance with the rule adopted by the United States in the existing war with Spain, neutral vessels found in port at the time of the establishment of a blockade will, unless otherwise ordered by the United States, be allowed thirty days from the establishment of the blockade to load their cargoes and depart from such port.

8. A vessel under any circumstances resisting visit, destroying her papers, presenting fraudulent papers, or attempting to escape, should be sent in for adjudication. The liability of a blockade runner to capture and condemnation begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade she is good prize from the moment she appears upon the high seas. Similarly, if she has succeeded in escaping from a blockaded port she is liable to capture at any time before she reaches her home port. But with the termination of the voyage the offense ends.

9. The crews of blockade runners are not enemies, and should be treated, not as prisoners of war, but with every consideration. Any of the officers or crew, however, whose testimony before the prize court may be desired, should be detained as witnesses.

10. The men-of-war of neutral powers should, as a matter of courtesy, be allowed free passage to and from a blockaded port.

11. Blockade running is a distinct offense, and subjects the vessel attempting, or sailing with the intent, to commit it, to seizure, without regard to the nature of her cargo. The presence of contraband of war in the cargo becomes a distinct cause of seizure of the vessel, where she is bound to a port of the enemy not blockaded, and to which, contraband of war excepted, she is free to trade.

RIGHT OF SEARCH.

12. The belligerent right of search may be exercised without previous notice, upon all neutral vessels after the beginning of war, to determine their nationality, the character of their cargo, and the ports between which they are trading.

13. This right should be exercised with tact and consideration, and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations: After firing a blank charge, and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whale boat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons. The officer, wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral and trading between neutral ports, the examination goes no further. If she is neutral and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war the vessel should be seized; if not, she should be set free, unless, by reason of strong grounds of suspicion, a further search should seem to be requisite.

14. Irrespective of the character of the cargo or her purported destination, a neutral vessel should be seized if she—

(1) Attempts to avoid search by escape; but this must be clearly evident.
(2) Resists search with violence.
(3) Presents fraudulent papers.
(4) Is not supplied with the necessary papers to establish the objects of search.
(5) Destroys, defaces, or conceals papers.

The papers generally to be expected on board of a vessel are:

(1) The register.
(2) The crew list.
(3) The log book.
(4) A bill of health.
(5) A charter party.
(6) Invoices.
(7) Bills of lading.

15. A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure, but not when she is a mail packet and carries them in the regular and customary manner, either as a part of the mail in her mail bags or separately, as a matter of accommodation and without special arrangement or remuneration. The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

16. A neutral vessel in the service of the enemy, in the transportation of troops or military purposes, is liable to seizure.

MERCHANT VESSELS OF THE ENEMY.

17. Are good prize, and may be seized anywhere, except in neutral waters. To this rule, however, the President's proclamation of April 26, 1898, made the following exceptions:

"4. Spanish merchant vessels in any ports or places within the United States shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, That nothing herein contained

shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

"5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

ENEMY'S PROPERTY IN NEUTRAL VESSELS NOT CONTRABAND OF WAR.

18. The President, by his proclamation of April 26, 1898, declared:

"1. The neutral flag covers enemy's goods, with the exception of contraband of war."

CONTRABAND OF WAR.

19. The term "contraband of war" comprehends only articles having a belligerent destination, as to an enemy's port or fleet. With this explanation, the following articles are, for the present, to be treated as contraband:

Absolutely contraband.—Ordnance; machine guns and their appliances, and the parts thereof: armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases for mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges, canteens, pontoons; ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpeter; military accouterments and equipments of all sorts; horses.

Conditionally contraband.—Coal, when destined for a naval station, a port of call, or a ship or ships of the enemy; materials for the construction of railways or telegraphs, and money, when such materials or money are destined for the enemy's forces; provisions, when destined for an enemy's ship or ships, or for a place that is besieged.

SENDING IN OF PRIZES.

20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

21. The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of seizure, and kept in the custody of the prize master. Attention is called to Articles Nos. 16 and 17 for the government of the United States Navy. (Exhibit A.)

22. All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and, if circumstances permit, it is preferable that the officer making the search should act as prize master.

23. As to the delivery of the prize to the judicial authority, consult sections 4615, 4616, and 4617, Revised Statutes of 1878. (Exhibit B.) The papers, including the log book of the prize, are delivered to the prize commissioners; the witnesses, to the custody of the United States marshal; and the prize itself remains in the custody of the prize master until the court issues process directing one of its own officers to take charge.

24. The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this can not be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But in all such cases all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

EXHIBIT A.

ART. 16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court-martial may direct.

ART. 17. If any person in the Navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge.

EXHIBIT B.

SEC. 4615. The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient, in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the Government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to such court, and subject to its order in the cause. (See Sec. 1624, Art. 15.)

SEC. 4616. If any vessel of the United States shall claim to share in a prize, either as having made the capture or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall

make out a written statement of his claim, with the grounds on which it is founded, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.

SEC. 4617. The prize master shall make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same, and are in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court. (See Sec. 5441.)

APPENDIX 4.

THE ADDITIONAL ARTICLES OF THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE SICK AND WOUNDED.

ARTICLE 1. The persons designated in article 2 of the convention (hospital and medical staff) shall, after the occupation of the enemy, continue to fulfill their duties to the sick and wounded, according to their wants, in the ambulance or hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

ART. 2. Arrangements will have to be made by the belligerent powers to assure to the neutralized person fallen into the hands of the enemy the entire enjoyment of his salary.

ART. 3. Under the conditions provided for in articles 1 and 4 of the convention the name "ambulance" applies to field hospitals and other temporary establishments which follow the troops on the field of battle to receive the sick and wounded.

ART. 4. In conformity with the spirit of article 5 of the convention, and to the reservations contained in the protocol of 1864, it is explained that for the appointment of the charges relative to the quartering of troops and of the contributions of war account only shall be taken in an equitable manner of the charitable zeal displayed by the inhabitants.

ART. 5. In addition to article 6 of the convention it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms and within the limits fixed by the second paragraph of that article, the wounded who may fall into the hands of the enemy shall be sent back to their country, after they are cured, or sooner if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

ART. 6. The boats which, at their own risk and peril, during and after an engagement, pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, as far as the circumstances of the engagement and the position of the ships engaged will permit.

The appreciation of these circumstances is intrusted to the humanity of all the

combatants. The wrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

ART. 7. The religious, medical, and hospital staff of any captured vessel are declared neutral, and on leaving the ship may remove the articles and surgical instruments which are their private property.

ART. 8. The staff designated in the preceding article must continue to fulfil their functions in the captured ship, assisting in the removal of the wounded made by the victorious party. They will then be at liberty to return to their country, in conformity with the second paragraph of the first additional article.

The stipulations of the second additional article are applicable to the pay and allowances of the staff.

ART. 9. The military hospital ships remain under martial law in all that concerns their stores; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

ART. 10. Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality: but the mere fact, noted on the ship's books, of the vessel having been visited by an enemy's cruiser renders the sick and wounded incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerent.

ART. 11. Wounded or sick sailors and soldiers, when embarked, to whatever nation they belong, shall be protected and taken care of by their captors.

Their return to their own country is subject to the provisions of article 6 of the convention and of the additional article 5.

ART. 12. The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefit of neutrality, in virtue of the principles of this convention, is a white flag with a red cross. The belligerents may exercise in this respect any mode of verification which they may deem necessary.

Military hospital ships shall be distinguished by being painted white outside, with green strake.

ART. 13. The hospital ships which are equipped at the expense of the aid societies, recognized by the governments signing this convention, and which are furnished with a commission emanating from the sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral, as well as the whole of their staff. They shall be recognized and protected by the belligerents.

They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their staff, while performing their duties, shall be an armlet of the same color. The outer painting of these hospital ships shall be white, with red strake.

These ships shall bear aid and assistance to wounded and wrecked belligerents, without distinction of nationality.

They must take care not to interfere in any way with the movements of the combatants. During and after the battle they must do their duty at their own risk and peril.

The belligerents shall have the right of controlling and visiting them. They will be at liberty to refuse their assistance, to order them to depart, and to detain them, if the exigencies of the case require such a step.

The wounded and wrecked picked up by these ships can not be reclaimed by either of the combatants, and they will be required not to serve during the continuance of the war.

ART. 14. In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality with any other view than the interest of the sick and wounded, gives the other belligerent, until proof to the contrary, the right of suspending the convention as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the convention is suspended with regard to him during the whole continuance of the war.

ART. 15. The present act shall be drawn up in a single original copy which shall be deposited in the archives of the Swiss Confederation.

The convention proper was signed at Geneva, Switzerland, August 2, 1864. It was signed by representatives of the following powers; i. e., the Swiss Confederation, Baden, Belgium, Denmark, Spain, France, Hesse, Italy, the Netherlands, Portugal, Prussia, and Wurttemberg. The ratifications of the contracting parties were exchanged at Geneva on June 22, 1865. In accordance with the invitation contained in the ninth article of the convention, the following powers acceded to the convention at various dates between 1864 and 1880. These were: Sweden, December 13, 1864; Greece, January 5–17, 1865; Great Britain, February 18, 1865; Mecklenburg-Schwerin, March 9, 1865; Turkey, July 5, 1865; Wurttemberg, June 2, 1866; Hesse, June 22, 1866; Bavaria, June 30, 1866; Austria, July 21, 1866; Russia, May 10–22, 1867; Persia, December 5, 1874; Roumania, November 18–30, 1874; Salvador, December 30, 1874; Montenegro, November 17–29, 1875; Servia, March 24, 1876; Bolivia, October 16, 1879; Chile, November 15, 1879; Argentine Republic, November 25, 1879; Peru, April 22, 1880. The convention was acceded to by the United States on March 1, 1882.

The additional articles were agreed to and signed at Geneva, on October 20, 1868, by the duly accredited representatives of the following powers, i. e., Great Britain, Austria, Baden, Bavaria, Belgium, Denmark, France, Italy, the Netherlands, the North German Confederation, Sweden, Norway, Switzerland, Turkey, and Wurtemberg.

In the published English text, from which this version of the additional articles is taken, the following paragraph appears in continuation of article 9. It is not found in the original French text adopted by the Geneva Conference, October 20, 1868:

"The vessels not equipped for fighting which, during peace, the government shall have officially declared to be intended to serve as floating hospital ships shall, however, enjoy during the war complete neutrality, both as regards stores and also as regards their staff, provided their equipment is exclusively appropriated to the special service on which they are employed."

By an instruction sent to the United States minister at Berne, January 2, 1883, the right is reserved to omit this paragraph from the English text, and to make any other necessary corrections, if at any time hereafter the additional articles shall be completed by the exchange of the ratifications thereof between the several signatory and adhering powers. The President of the United States, in his proclamation announcing the accession of that power to the Geneva convention, reserves the promulgation of the additional articles until the exchange of the ratifications thereof between the several contracting States shall have been effected and the said additional articles shall have acquired full force and effect as an international treaty.

APPENDIX 5.

SPECIAL ORDER } NAVY DEPARTMENT,
No. 54. } *Washington, November 9, 1896.*

The following translation of a copy of a decree of the Government of France, dated Paris, June 12, 1896, prescribing certain regulations in regard to the entrance and sojourn of vessels in seaports of that country, in time of war, is published for the information and guidance of commanding officers of vessels of the United States Navy.

H. A. HERBERT, *Secretary.*

DECREE ESTABLISHING REGULATIONS CONCERNING THE ENTRANCE AND SOJOURN IN FRENCH PORTS AND ANCHORAGES, DURING TIME OF WAR, OF FRENCH AND OF FOREIGN VESSELS.

The President of the French Republic, upon the recommendation of the minister of marine, decrees:

ARTICLE I. In time of war, between sunrise and sunset, no French merchant vessel, nor any foreign vessel, whether a man-of-war or a merchantman, shall approach within less than 3 miles of the French coasts (France and French possessions) before having been authorized so to do. Between sunset and sunrise the prohibition to approach within less than 3 miles is absolute.

Between sunrise and sunset all vessels that are at such a distance from the land that their colors can be distinguished therefrom shall carry their national colors. If they desire to enter the prohibited regions, they shall so signify by hoisting the signal for a pilot; but they shall remain without the 3-mile limit until they have been boarded, or until a semaphore has signaled to them that their request has been granted.

All vessels must immediately obey all orders signaled by a semaphore or received from a man-of-war, either verbally or by international code or signal.

ART. II. In time of war, in case of failure by a vessel affected by this decree to conform to the above order, the nearest fort or vessel of war shall warn her to obey the same by firing a blank charge. If this first notice is without effect, there shall be fired, two minutes later, a projectile, and finally, after another interval of two minutes, if the vessel does not stop or stand off, an effective fire shall be opened.

In case of urgency, the preliminary blank charge may be omitted. A vessel that violates the order relating to the interdiction of the prohibited districts renders itself liable to be destroyed.

ART. III. In time of war no small craft, other than those belonging to French men-of-war, shall go and come in the fortified roadsteads and harbors without special authorization and without having received from the maritime authorities the means of making themselves known.

During both day and night the going and coming of small steamers, other than those belonging to French vessels of war, shall be absolutely prohibited. Rowboats, however, can go and come from sunrise to sunset, provided they have received permission from the port authorities, but under the reservation that they are to keep clear of vessels of war, if so ordered, and of not communicating with them, in any case, without having asked and received authority so to do.

The going and coming of authorized small craft is subjected elsewhere to the local instructions issued by the prefectoral authority and especially as regards the prohibition to enter certain portions of the roadsteads or of communicating with any other places than those expressly designated.

In commercial ports special measures will be taken by higher authority, of such a nature as to serve the interests of commerce, although imposing upon the traffic of small craft the restrictions judged necessary.

ART. IV. In time of war, vessels authorized to enter French roadsteads and harbors must take the anchorages which will be assigned them by the local authorities and conform to the instructions of every kind issued by these authorities.

The length of their sojourn is subordinate to the necessities of the military command, and when it is necessary to place these localities upon a war footing the higher authority can, if circumstances require it, order them to withdraw to the offing or to some designated place.

This order must be executed at once, but a delay may always be granted to vessels which are justified in being so situated as to render immediate compliance impossible. No vessel shall get under weigh either to change her anchorage or to leave the harbor without having been authorized so to do by the local authorities.

ART. V. The measures provided for by Articles III and IV may be put in force during the period of mobilization.

Dated at Paris, June 12, 1896.

FELIX FAURE.

By the President of the Republic.
The Minister of the Marine,
G. BESNARD.

APPENDIX 6.

EXISTENCE OF WAR—SPAIN.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas by an Act of Congress approved April 25, 1898, it is declared that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the Kingdom of Spain; and

Whereas, it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris;

Now, Therefore, I, WILLIAM MCKINLEY, President of the United States of America, by virtue of the power vested in me by the Constitution and the laws, do hereby declare and proclaim:

1. The neutral flag covers enemy's goods, with the exception of contraband of war.

2. Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag.

3. Blockades in order to be binding must be effective.

4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term; Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval

service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish Government.

5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, on the twenty-sixth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

[SEAL.] WILLIAM MCKINLEY

By the President.

ALVEY A. ADEE

Acting Secretary of State.

APPENDIX 7.

AS TO NEUTRAL VESSELS OF WAR ENTERING BLOCKADED PORTS.

This matter is of growing importance. It may be a serious disadvantage, if not positive injury, to a blockading belligerent to have a blockaded port subject to frequent or sympathetic visits of a neutral vessel of war. The tendencies favor a limitation of such visits which usage permits as a matter of courtesy alone. The vessel of war desiring to enter the blockaded port should, in seeking permission, if necessary, establish her identity to the blockading vessels. Quotations from authorities upon this subject follow here.

Captain Ortolan, of the French navy, in his Diplomatie de la Mer, vol. 2, p. 329, says:

"En droit, l'accès et la sortie de ce lieu sont interdits aussi bien aux bâtiments de guerre qu'à ceux de commerce.

"'Très-certainement,' a écrit M. Wheaton, 'le droit de visite ne peut être exercé sur un bâtiment de guerre, mais il n'est pas moins certain qu'un tel navire n'a pas le droit d'entrer dans un port bloqué ni d'en sortir, à moins qu'il n'y fût déjà à l'époque où a commencé le blocus.' Néanmoins, la puissance tenant le blocus affranchit souvent de la règle les bâtiments de guerre en raison du caractère dont ils sont revêtus et des privilèges dont ils jouissent, et cette concession qu'exigent les égards dus aux gouvernements neutres doit, comme l'indique aussi M. Wheaton, être faite toutes les fois qu'elle peut se concilier avec l'objet de la guerre. Les Etats-Unis, depuis le commencement de leur lutte actuelle contre les Etats confédérés, laissent l'entrée et la sortie des ports qu'ils bloquent libres aux navires de guerre des neutres.

"En fait, le but principal d'un blocus étant d'interdire tout commerce par mer avec le lieu bloqué, le moyen d'atteindre ce but reste tout entier si la prohibition d'entrer et sortir n'est appliquée qu'aux navires marchands."

Perels, a German authority, makes the following statement upon the subject, which is the more interesting from his position as lecturer at the Imperial Naval Academy at Kiel. In his work, translated into French by Arendt, he says, on page 293:

"(3) La fermeture de la place bloquée doit être respectée par les navires de guerre et de commerce neutres: il n'est pas rare, cependant, que les navires de guerre neutres soient exceptés de la prohibtion d'entrer. Les égards auxquels ont droit les puissances neutres justifient d'autant plus cette concession qu'elle ne porte aucune atteinte au but essentiel du blocus, qui est la suspension des relations commerciales par mer. C'est ainsi que, pendant le blocus des côtes des états confédérés par la flotte de l'Union, tous les navires de guerre neutres y eurent libre accès. Le Gouvernement français avait adopté une règle contraire en 1838, lorsqu'il fit mettre, par sa flotte, les côtes de la république Argentine en état de blocus. Le département des affaires étrangères rendit alors le décret suivant: 'Les bâtiments de guerre neutres se présentant devant un port bloqué doivent aussi être invités à s'éloigner; s'ils persistent, le commandant du blocus a le droit de s'opposer à leur entrée par la force, et la responsabilité de tout ce qui peut s'en suivre pèsera sur les violateurs du blocus.'"

Captain Testa, of the Portuguese navy, professor at the naval school in Lisbon, in the French translation of his work, by M. Boutiron, states on page 225 that—

"D'accord avec les principes admis, le blocus établit le droit de prohiber l'entrée des points bloqués tant pour les navires de guerre que pour les navires de commerce. Cependant, les puissances qui établissent le blocus autorisent souvent la libre entrée et la sortie des navires de guerre neutres par la considération qu'il n'est pas présumable, d'après leur caractère, qu'ils aillent aider le belligérant bloqué; et qu'en outre, la fin principale du blocus étant d'interdire le commerce par mer, l'entrée ou la sortie des navires de guerre impartiaux et non commerçants ne porte pas préjudice à ce but."

Calvo says, in section 2561, page 97, of volume 4, that—

"En droit l'accès et la sortie d'un port bloqué sont interdits aussi bien aux bâtiments de guerre qu'aux navires de commerce.

"'Un bâtiment de guerre,' dit Wheaton, 'n'as pas le droit d'entrer dans un port bloqué ni d'en sortir, à moins qu'il n'y fût déjà à l'époque où a commencé le blocus.'

"Cependant, les belligérants, en considération tant des égards qu'ils doivent aux autres gouvernements que du caractère dont sont revêtus les bâtiments de guerre et des privilèges dont ils jouissent, laissent souvent, toutes les fois que cette concession peut se concilier avec l'objet de la guerre, l'entrée et la sortie des ports qu'ils bloquent libres aux navires de guerre neutres."

Mr. J. H. Ferguson, formerly of the Netherlands royal navy, and at one time minister of the Netherlands in China, says in his manual, volume 2, page 486, article 276:

"During the continuance of the state of blockade no vessels are allowed to enter or leave the blockaded place without special license or consent of the blockading authority. Public vessels or vessels of war of neutral powers are all equally bound by the same obligation to respect the blockade. When the public vessel of a neutral State, to have communication with a blockaded place, the neutral commanding officer is obliged to observe strict neutrality and to comply with the conditions under which such permission has been granted to cross the lines of the blockading belligerent. The impartiality, which must be the prevailing feature of an effective blockade, prohibits that, except to public vessels, permission to enter the blockaded place be given than in extreme cases of positive necessity. Diplomatic agents and consular officers of a neutral State are also allowed the amount of communication necessary for the fulfillment of their official duties."

Hall says, on page 737, that:

"The right possessed by a belligerent of excluding neutral ships of war from a blockaded place is usually waived in practice as a matter of international courtesy; and for a like reason the minister of a neutral State resident in the country of the blockaded ports is permitted to dispatch from it a vessel exclusively employed in carrying home distressed seamen of his own nation."

Walker, on page 522, says:

"The stringency of a blockade may indeed be relaxed in two peculiar cases. After the expiration of the period appointed for the withdrawal of ordinary neutral private vessels, and at any time during the continuance of the investment men-of-war flying the flags of neutral powers are commonly by courtesy permitted to communicate with the blockaded ports, and to maintain the public correspondence of their own or other neutral governments with their respective consular or diplomatic agents. It behooves such licensed carriers, however, to see to it that their privilege does not become a cloak for illegitimate dealings. The acting British consul at Mobile in 1863, having placed on board Her Majesy's ship *Vesuvius* for conveyance to Havana a large sum of money belonging to the State of Alabama and destined to pay the London interest due from that State to British bondholders, the offender, Mr. Magee, was promptly dismissed from the British service. and Lord Lyons was instructed to apologize to the United States Government for conduct on the part of a British civil servant, which was 'entirely at variance with the duties of an agent of a neutral power.' In any case the communication of neutral vessels of war with a coast under blockade is, as Vice-Admiral Milne clearly intimated to the officers of his fleet in 1863, permissive only, and not of strict right."

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NOTE---These solutions were not formulated until 1898, though the situations were prepared in 1897, and discussed during that course.

NAVAL WAR COLLEGE.

INTERNATIONAL LAW.

SITUATION NO. 1—1896

The Greek population of Crete is in a state of insurrection against the Turkish Government, and the insurgents are being actively assisted by the Government of Greece. The six great powers of Europe have resolved upon concerted action in order to prevent, if possible, the conditions in the island of Crete from bringing on a general war. They have agreed to enforce a blockade of the island to prevent supplies of all kinds from being sent to the insurgents. A notification to this effect has been received by the Government of the United States, which has neither recognized nor given official notice of this blockade.

An American steamer, the *Kensington*, lying in the Pireus, has been chartered by Greek merchants, loaded with provisions for the insurgents, and has sailed for Khania, where the United States naval force of 4 protected cruisers is anchored, together with 12 battleships and 10 cruisers representing all of the six powers. Upon nearing the harbor the *Kensington* is boarded by an officer representing the commander in chief of the forces of the six powers and warned that he will not be permitted to land his cargo anywhere on the island.

The commander of the *Kensington* visits the flagship of the United States squadron and asks what her international rights are, and requests advice. What are her rights and what advice should be given?

2. On the day following the arrival of the *Kensington* at Khania her commanding officer weighs anchor, steams to Retimo, which is in possession of the insurgents, and

in attempting to land the cargo at a point on the coast near Retimo is first fired upon by the ships representing the six powers and is afterwards taken possession of. Six hours after this occurrence information reaches the United States admiral that the *Kensington*, in attempting to land her cargo near Retimo, was fired upon by ships of the six powers, her captain and two seamen killed by the fire, six of the crew wounded, and that the ship had been captured by the ships representing the six powers, and was then steaming toward Khania convoyed by six protected cruisers—one Italian, one German, two English, one French, and one Russian.

Under these circumstances, what are the duties of the United States admiral?

DISCUSSION.

The blockade of Crete by the six powers can only be justified as an instance of *pacific blockade*, which is characterized by Snow (p. 79) as "a growing means of coercion short of war," the practice of which "seems fairly well established."

Writers on international law are divided on this question and may, according to Mr. Thomas Barclay, an English lawyer of high repute, be classified as follows:

First. Those who think the pacific blockade absolutely unjustifiable—Hautefeuille, Westlake, Geffcken, Woolsey.

Second. Those who approve the practice as a necessary evil, on the condition it is so conducted as not to affect third states—De Martens, Calvo, Bluntschli.

Third. Those who admit the practice as at all events a less evil than war, and who believe that the blockade should affect third states—Perels, Des Jardens, and others.

In 1887 the *Institut de Droit International* adopted a declaration as to pacific blockades, which stated (Snow, p. 80) that the establishment of a blockade without a state of war ought to be considered permissible by the laws of nations only under the conditions that vessels of foreign flags can enter freely, notwithstanding the

blockade; that the pacific blockade be formally declared and notified and maintained by sufficient force, and that vessels of the blockaded nation which do not respect the blockade can be sequestered; but that when the blockade ceases these vessels and their cargoes should be restored to their owners, but without compensation.

Hall says (p. 340 et seq.): "The real question then is whether a state in time of peace can endeavor to obtain redress from a second state for actual or supposed injuries by means which inflict loss or inconvenience on other countries. Lord Palmerston at any rate thought not. In writing to Lord Normanby, the ambassador at Paris in 1846, with reference to the blockade of La Plata, he said, 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from the first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas; but blockade is a belligerent right, and unless you are at war with a state you have no right to prevent ships of other states from communicating with the ports of that state; nay, you can not prevent your own merchant ships from doing so.'"

Woolsey says (p. 443): "The right of blockade is one affecting neutrals, and a new kind of exercise of this right can not be introduced into the laws of nations without their consent, * * * and neutrals have not given their consent to this new form of restriction of their rights. They would, if such a practice were continued, regard a pacific blockade as an act of war under a wrong name, or claim damages for all injury thereby inflicted on their commerce, which only war rights can interfere with."

Walker says (Snow, p. 79): "If it (pacific blockade) be confined to the subjects of the parties directly engaged its legitimacy can hardly be a matter for serious consideration. The less is justified in the greater, and the blockaded sovereign has it in his power either to free himself from the inconvenience by the grant of redress or to resent it by the declaration of war.

"If, however, the trade of neutrals be affected by the blockade, those neutrals may well protest against interference with their traffic not fully and completely justifiable. For them such a protest must be a matter of policy."

Glass says (p. 458): "Neutrals would not to-day submit to restrictions placed upon their trade by measures of blockade, unless instituted in the prosecution of open declared war."

Pacific blockades were unknown prior to 1827. Since that time they have been declared by both England and France, and at different times by one or more of the powers. France, Germany, Russia, Austria, and Italy acting in concert with Great Britain.

The French blockade of Mexican ports in 1838 extended to vessels of other nations. Mr. Vail, Acting Secretary of State of the United States, in a letter to Mr. Pontois, under date of October 23, 1838, says: "In the absence of rules in relation to blockades in time of peace, those applicable to blockades in time of war are the only ones according to which the case of the *Lone* is to be considered."

The joint blockade of the Plata by the English and French (1845–1848) extended to vessels of other nations. The opinion of Lord Palmerston, then minister of foreign affairs, regarding the legality of this blockade has already been quoted.

The French blockade of Formosa in 1884 was intended to include vessels of other nations, but Great Britain refused to admit that the French Government had the right in international law to capture and condemn the vessels of other nations.

The blockade of Greece in 1886, by Great Britain, Germany, Russia, Austria, and Italy, judging from the instructions given to the British admiral (Snow, p. 80), extended only to the vessels of the powers interested, and even these vessels under certain conditions went free when carrying cargo belonging to citizens of other nations.

It is thus evident that the right to maintain a blockade

in time of peace and to extend its operations to the vessels of a third state is not as yet recognized by international law. Such a blockade can only be operative against a third State by its *expressed consent*, and it does not seem reasonable to hold that such consent can be implied from an omission on the part of the third state to formally protest, in each and every case, before direct injury to its interests has occurred or been threatened.

The letter of Assistant Secretary of State Vail, which is held by some to define the position of the United States with reference to pacific blockades in general, should rather be looked upon as an exposition of the rules which, in his opinion, should be applied to the particular case of blockade with which he was dealing, and to which, though outside the existing and then recognized rules of international law, the United States, for reasons of policy, was willing to assent. The expression "In the absence of rules in relation to blockades in time of peace," etc., is significant. If the principle involved was at that time well established, certainly the rules governing its application would have been equally well understood and not *absent*.

THE KENSINGTON CASE.

I.

Not having been notified of the blockade of Crete by his own Government,* the United States admiral should advise the master of the *Kensington* that while as a pure question of international law he had the right to unmolested entry into any port of the island, yet, having in view the dominating influence which the six powers have always exercised, without question on the part of the United States, in the affairs of the Levantine nations, more especially in those of Greece and Turkey, and the fact that the blockade, practically directed against Greece, is maintained by the six powers acting

* It is the practice of the United States Government to notify the commanders of the United States naval forces of blockades established by other nations within the limits of the stations to which such forces are assigned.

in concert, it would be unadvisable for him to assert this right by attempting to force the blockade. His better course would be to protest to the officer commanding the blockading forces against the interference with his voyage; to inform that officer that he will report the case to the United States Government, and ask that steps be taken to procure suitable reparation for the damages to himself and his owners resulting from this illegal interruption of the *Kensington's* voyage, and finally to demand that the fact that he protests, together with the fact that he was warned off, be entered on the *Kensington's* log over the signature of some responsible officer of the blockading forces.

II.

Being satisfied of the facts, the duty of the United States admiral is to demand from the commanding officer of the blockading forces the immediate restoration of the *Kensington*, informing him that the facts of the case will be reported to the United States Government for such action as it may deem proper with reference to the loss of life and other damages which have resulted from his action in firing upon and seizing the vessel.

Up to this point the staff of the college, believing that the *Kensington* was clearly within her legal rights in attempting to force the blockade, is practically unanimous,* but as to what should be the subsequent action of the United States admiral they are not agreed.

*It is held by some, however, that a blockade in time of peace is now a recognized means of securing redress; that its operation rightly extends to vessels of third states; that the captain of the *Kensington* should be advised that an attempt on his part to disregard the blockade would justify the seizure of his vessel; that after the capture of the *Kensington* the United States admiral should relieve, as far as possible, the suffering on board the vessel, insist on the most humane treatment of her crew by the captors, demand a fair and speedy trial of the case before a proper prize court, and finally that he should secure all the evidence obtainable, report the matter at once to the home Government, and await instructions.

Some hold that, in case the demand for the restoration of the *Kensington* is not promptly complied with, the United States admiral should endeavor to take possession of the vessel, using force if necessary, even though this course should involve the destruction of his entire command. The Government at Washington having had an opportunity to recognize the validity of the proposed pacific blockade and having failed to do so, the American admiral would go beyond his powers if he should assume to pronounce upon a question of policy for which the President alone is responsible to the country, and should himself admit the validity of the action of the six powers. Until otherwise instructed his duty is to deny it by word and deed.

Others, while admitting that the capture of the *Kensington* was an undoubted infringement of the rights of an American vessel and that her recapture by force would be justifiable and under certain conditions obligatory, believe that in the case under consideration an attempt to take the vessel would fail, would aggravate the situation, might lead to war, and would be inexpedient.

The six powers are responsible civilized governments. Their position, that of France excepted, with reference to pacific blockades and the rights of the vessels of non-interested states thereunder is sufficiently indicated by the instructions to the British admiral for the conduct of the blockade of Greece in 1886. The position of Great Britain is further shown in the stand taken by that nation in reference to the French blockade of Formosa in 1884 and by Lord Palmerston's dictum regarding the blockade of the Plata, 1845–1848.

The United States admiral is therefore justified in assuming that proper reparation can be secured through the ordinary channels of diplomacy. This being granted, an attempt on his part to recapture the vessel would be taking, unnecessarily, a very serious responsibility. His action should not go beyond the demand for the restoration of the vessel, coupled with the intimation that the United States Government would exact full indemnity for the loss of life and damage to property.

INTERNATIONAL LAW.

SITUATION NO. 2—1897.

A Japanese squadron of three protected cruisers, with a commissioner, has arrived at Honolulu in consequence of the refusal of the Hawaiian Government to permit an ever-increasing number of Japanese emigrants to land. These emigrants have certificates from the Imperial Japanese Bank at Tokyo to show that they have on deposit in Japan the amount of money which is required by the Hawaiian Government in accordance with the terms of a treaty. This monetary exaction by Hawaii is for the purpose of preventing the transportation of an unlimited number of undesirable Japanese emigrants either as paupers or soldiers, the Hawaiian Islands being in a defenseless condition. The Hawaiian Government and the Japanese commissioner failing to come to an agreement on the rights of the Japanese under the treaty, the Japanese forces occupy Honolulu.

On the day after this occupation a squadron of three United States protected cruisers appears off the harbor of Honolulu. The commander in chief observes the Japanese flags hoisted over the Government buildings and soon after, before the squadron reaches the entrance to the harbor, receives a written notification from the Japanese admiral that his force has taken possession of Honolulu for the purpose of enforcing the treaty rights of his Government, and that the city and surrounding country are under martial law. The Japanese boarding officer at the same time brings the information that the American minister to Hawaii had died on the previous day.

When the United States force had been withdrawn from Honolulu in 1893, the President had stated publicly that no foreign government would be permitted by the United States to take possession of the Hawaiian Islands.

In this position what should the American admiral do; and upon what grounds should he base his line of action?

The action of the Japanese in landing upon the Hawaiian Islands and forcibly occupying Honolulu was unwarranted and an indignity to both the Hawaiian Republic and to the United States, whose relations to the islands, both under the republic and the former monarchy, have amounted to a virtual protectorate over them.

The Hawaiian Government, viewing with alarm the influx of Japanese emigrants, and believing, putting aside the suspected military character of the emigrants, that their number alone constituted a grave menace to Hawaiian institutions and might eventually endanger the very existence of the Government, had, as a measure of self-protection, the right to refuse admission to Japanese emigrants. The right of self-protection is a fundamental one for States as well as for individuals, and in an exigency easily may rise above any technical treaty stipulation.

The position of the United States with reference to the Hawaiian Islands has been tacitly recognized by other nations, and is amply shown in treaties and other state papers.

In 1851, Mr. Webster, then Secretary of State, informed the Hawaiian Government that, "The Navy Department will receive instructions to place and to keep the naval armament of the United States in the Pacific Ocean in such a state of strength and preparation as shall be requisite for the preservation of the honor and dignity of the United States and the safety of the Government of the Hawaiian Islands. In 1849 a treaty was made with the Hawaiian Islands of friendship, commerce, and navigation. In 1875 another treaty was made establishing reciprocal trade relations, which treaty, in Article IV, contains the following words: "It is agreed, on the part of His Hawaiian Majesty, that so long as this treaty shall remain in force, he will not lease or otherwise dispose of or create any lien upon any port, harbor, or other territory in his dominions, * * * to any other power, state, or government, * * *." In

1881 Mr. Blaine, then Secretary of State, in a dispatch to the United States minister resident at Honolulu, which dispatch it was ordered should be shown to the Hawaiian Government, said: "But under no circumstances can the United States permit any change in the control of either (Hawaii or Cuba) which would cut it adrift from the American system, whereto they both indispensably belong."

That negotiations for the annexation of the Hawaiian Islands to the United States have been entered upon in the past, that there is every probability that these negotiations will be resumed, and the President's declaration in 1893 that no foreign government would be permitted by the United States to take possession of the Hawaiian Islands, are matters of common fame, and were presumably well known to the Japanese. Under the circumstances, the action of the Japanese admiral was not only an invasion of the rights of a country linked closely to the United States, but was also an act of unfriendliness to the United States itself, a practical violation of its treaty rights, and an affront to its honor and dignity.

Compelled by the death of the diplomatic representative of the United States to act alone, the American commander in chief should notify the Japanese admiral that his unwarranted occupation of Hawaiian territory can not be allowed to continue; that all such territory must at once be restored to the Hawaiian Government; that the Japanese forces must be withdrawn from the shore, and that if, at the expiration of twenty-four hours, these demands have not been complied with, he will be constrained to enforce them, using all the means at his command.

Article 285, Navy Regulations, 1896, provides that "on occasions where injury to the United States * * * is committed or threatened, in violation of the principles of international law or treaty rights, he (the commander in chief) shall * * * take such steps as the gravity of the case demands." * * *

Article 286 also justifies the use of force in this case, under the right of self-preservation.

INTERNATIONAL LAW.

SITUATION NO. 3—1897.

The continued massacre of Armenians in Asiatic Turkey has resulted in grave fears of a general crusade against Christians in the Turkish Empire. A United States squadron of four protected cruisers has been stationed on the Syrian coast and at this time is at anchor in Besika Bay.

The six great powers have agreed that the Dardanelles shall be closed to ships of war of all nations, and the Turkish Government has acquiesced in this decision. It has been the custom in the past for the commanding officers of American ships of war who wish to visit Constantinople to first obtain a "firman," and permission has always been restricted to dispatch vessels or to third rates.

The admiral commanding the United States squadron is notified by the American minister at Constantinople that three American missionaries, who have come to Constantinople from the interior for safety, have been killed by a mob which is practically in possession of the city; that he has been warned that an attack will be made upon the United States legation, and that, in such an event, he fears the worst; because, from his own experience and observation, he has no confidence in the assurances of protection which he has from the Turkish Government. The minister also states that the land telegraph wires have been cut and that he has not been able to communicate with Washington. The admiral knows that there is a break in the cables of the Eastern Telegraph Company, which has a station at Besika Bay, and that there is no likelihood of its being repaired for two days. The Turkish Government has already refused him permission to visit Constantinople in any one of the ships of his command.

Under such circumstances, what are the rights of the United States, and what would be the duty of the commanding officer of its naval forces in the Mediterranean?

Justice Miller, of the Supreme Court of the United States, in his decision in the Slaughter House Cases, says: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States."

The protection of American citizens abroad is put by the Navy Regulations (art. 286) under the fundamental right of self-preservation, which includes "the protection of the State, its honor, and its possessions and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury."

As a general rule, the prevention of impending or the redress of actual injury to a state or to its citizens at the hands of another state should be sought through the ordinary channels of diplomacy. When, however, the offending state presumably is unwilling, or, by reason of the weak or unstable character of its government, unable, to afford the proper measure of protection or redress, or when the anticipated injury is imminent, then the presence of men-of-war of the threatened or injured state is most useful, and may be imperatively necessary, to give moral strength and tone to the requests and demands of its diplomatic and consular officers, to prevent violence and offer refuge to its citizens, and to take such action as may be ordered by their government for securing immediate and proper redress.

There is nothing in a diplomatic way, except the agreement of the six great powers of Europe, to which the United States never acceded (see Snow's lectures, p. 30), to prevent the naval force of the United States proceeding at once to Constantinople and there performing its manifest and urgent duty of protecting

American citizens, officials, and property. While preparing to leave for Constantinople and to force the passage of the Dardanelles, if necessary, the United States admiral should arrange for the conveyance of the news of his proposed action and intentions in the most expeditious manner possible to the home government, and as the six great powers are responsible to a large extent for the condition and conduct of Turkey, the facts of the outrages should be communicated to the senior admiral of the combined naval forces of the powers for his information.

Arriving at Constantinople, without delaying to communicate in any way with the Turkish Government, the force under the American admiral should be disposed on shore and afloat at once so as to offer the greatest protection and refuge possible to the officials of the United States, the legation, and to all citizens, and so far as possible to their property. It is to be presumed that the United States minister has communicated with the Turkish authorities and demanded from them proper and complete protection for the legation, and for the lives and property of our citizens.

Indemnity and punishment for what has happened before the arrival of the United States forces at Constantinople is a matter to be determined by the Government and not by the admiral.

INTERNATIONAL LAW.

SITUATION NO. 4—1897.

The Nicaragua Canal having been finished, the United States has guaranteed by treaty with Nicaragua "the perfect neutrality" of the territory through which the canal passes in order "that the free transit from the one to the other sea" shall not be interrupted nor embarrassed; and in consequence the United States has also guaranteed "the rights of sovereignty and property which Nicaragua has and possesses" over the territory.

A revolution breaks out in that State. The country from the eastern entrance of the canal to Lake Nicaragua is controlled by the revolutionists, who, although not recognized by the representatives of any foreign state, have established forms of local government. The rest of Nicaragua is in possession of the regularly constituted government, which is preparing a force to attack the insurgents. The armored cruiser *Brooklyn* is lying off Greytown, with the German cruiser *Kaiserin Augusta* at anchor a mile farther out. The North German Lloyd steamer *Kaiser Wilhelm* has entered the canal with cargo for ports in Nicaragua and on the Pacific coast of Central and South America.

A few hours after the German steamer has entered the canal and while she is still secured to the quay opposite the canal company's offices discharging cargo, her flag is seen to be at half-mast with the stripes inverted.

An officer is sent from the *Brooklyn* to find out the reason why this distress signal had been hoisted, but he does not return. In half an hour a canoe with the first officer of the *Kaiser Wilhelm* is reported to be alongside the *Brooklyn*. He tells the captain of the *Brooklyn* that the consul of the United States, also acting as the German consul, had gone to the *Kaiser Wilhelm* upon being informed that the insurgents, numbering 125 armed men, were about the ship, and that the hold was being searched for boxes of rifles and ammunition which the insurgent leader, who was the head of the revolutionary government, insisted were consigned to or intended for the Government of Nicaragua at Managua. Upon the consul protesting against this action of the insurgents, both he and the officer sent from the *Brooklyn* were seized and forcibly taken to a station on the canal 3 miles from Greytown. This statement of the *Kaiser Wilhelm's* first officer is confirmed by a note from the United States consul to the captain of the *Brooklyn*, in which he added that the insurgent leader had threatened to put him and the officer of the *Brooklyn* to death in case any action were

taken by the American captain against the revolutionists.

After the delivery of the note and the message, the first officer left the ship and pulled toward the *Kaiserin Augusta*.

What rights has the United States under the treaty with Nicaragua, and what is the duty of the commanding officer of the *Brooklyn?*

DISCUSSION.

The treaty between the United States of America and Nicaragua relating to the Nicaragua Canal is comparable with the treaty between the former Government and the United States of Colombia with reference to the transit of the Isthmus of Panama, the distinction being that one relates to a water and the other to a land route.

As the United States guarantees the "perfect neutrality" of the territory through which the canal passes in order "that the free transit from sea to sea shall not be interrupted nor embarrassed," the consequent obligations rest upon that Government alone. In this case, as in that of the Panama Railroad, other nations look to the United States to keep the transit open, and when from any cause the interruption is threatened or occurs, take action themselves only in the absence of United States forces.

Under these conditions, although the *Kaiser Wilhelm* is a German vessel, it is the duty of the captain of the *Brooklyn* to see that her passage through the canal is not interfered with, and this without regard to the nature of her cargo. If he deems the force at his command inadequate for that purpose, he may invite the cooperation of the *Kaiserin Augusta*, but should do so only in case of necessity. On the other hand, in the absence of the United States forces, the commanding officer of the German cruiser has the general right to take action, as the English have done heretofore at Panama. The captain of the *Brooklyn* should land a force, expel the searching party of the insurgents from

the *Kaiser Wilhelm*, protect that vessel from further interference with her voyage, and rescue the United States consul and the *Brooklyn's* officer. He should also take possession of the portion of the canal within the region of the operations of the insurgents and hold it until peace and order are restored by the regular Government of Nicaragua. A patrol of the canal, by launches, for the purpose of convoying vessels and preventing interference with them or the canal would be advisable.

Under its treaty with Nicaragua, the United States can not permit operations on the part of the insurgents that interfere with the passage of vessels or merchandise—arms and military stores not excepted—through the canal, and is bound to maintain a perfectly free transit. The latter duty may involve garrisoning the route of the canal, or, in an extreme case, military operations against the insurgents.